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IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1895.

No. 913

UNITED STATES OF AMERICA ex rel.
RUDOLPH DEIMEL

vs.

JOHN W. ARNOLD, United States Marshal
for the Northern District of Illinois.

PETITION OF RUDOLPH DEIMEL

For a WRIT OF CERTIORARI to the UNITED STATES CIRCUIT COURT OF APPEALS for the SEVENTH CIRCUIT.

HIRAM T. GILBERT,
ATTORNEY FOR PETITIONER.

BARNARD & MILLER, PRINTERS.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1895.

UNITED STATES ex rel. RUDOLPH DEIMEL

vs.

JOHN W. ARNOLD, United States Marshal for the Northern District of Illinois.

To the Honorable the Judges of the Supreme Court of the United States:

Your petitioner Rudolph Deimel of the County of Cook and State of Illinois, respectfully shows that in the month of February, A. D. 1890, Julius Stroheim and Salo J. Stroheim, then being citizens and residents of the State of New York, as plaintiffs, commenced in the Circuit court of the United States in and for the Northern division of the Northern district of Illinois, their certain action on the case for deceit against one Joseph Deimel and your petitioner, who were then citizens and residents of the State of Illinois, as defendants, in which said action the plaintiffs did, on the 21st day of February, A. D., 1890, duly file their declaration claiming damages of the defendants on account of certain alleged false representations claimed to have been made by the defendants for the purpose of deceiving the plaintiffs, to which declaration the defendants on the 5th day of March, A. D., 1890, duly filed in said court their plea commonly called the plea of the general issue.

Your petitioner further says that on the 28th day of March, A. D., 1894, a trial was had in said Circuit court of the United States in said suit without a jury before the Hon. Romanzo Bunn, District Judge, then holding said Circuit court, said trial being had before said Judge against the objection of said defendants.

Your petitioner further says that on the 23rd day of July, A. D., 1894, final judgment in favor of the plaintiffs and against the defendants was entered ~~by~~ in said cause, which said final judgment was and is in the words and figures following, to wit:

"The following order is entered by the direction of "the Hon. Romanzo Bunn, District Judge of the United "States for the Western District of Wisconsin.

"Julius Stroheim *et al.*,
v.
"Joseeph Demiel and Rudolph Demiel.

"On the stipulation in writing of all the parties hereto, "heretofore duly filed herein by the attorneys of record "for the parties to this suit with the clerk of this court, this "cause is submitted to the court for trial without the in- "tervention of a jury, and the court now, after hearing "all the evidence adduced, the arguments of counsel, "and being duly advised in the premises, finds the de- "fendants, Joseph Deimel and Rudolph Deimel, guilty, "and assesses the plaintiff's damages at the sum of eighty- "five hundred ($8,500) dollars.

"Therefore, it is considered by the court that the "plaintiffs, Julius Stroheim and Salo J. Stroheim, do "have and recover of and from the said defendants, Jo- "seph Deimel and Rudolph Deimel, their said damages "of eighty-five hundred ($8,500) dollars, in form as "aforesaid by the court assessed, together with their

" costs and charges in this behalf taxed at the sum of " ....., and that the plaintiffs have " execution therefor."

Your petitioner further shows that on the 17th day of November, A. D. 1894, the plaintiffs in said suit sued out of said Circuit court of the United States a writ of *capias ad satisfaciendum* upon said judgment, directed to the marshal of the Northern district of Illinois to execute, under and by virtue of which said writ of *capias ad satisfaciendum*, said marshal did on the 20th day of November, A. D. 1894, arrest and take into his custody your petitioner, one of the defendants therein.

Your petitioner further says that on the 21st day of November, A. D. 1894, your petitioner filed in said Circuit court of the United States in and for the Northern division of the Northern district of Illinois, his petition for a writ of *habeas corpus* to obtain his release and discharge from the said arrest so made by the said marshal, upon which said petition such proceedings were had that on the same day a writ of *habeas corpus* was issued as payed for in said petition under and in pursuance of which writ said marshal did on the 28th day of November, A. D. 1894, produce the body of your petitioner before said court, and thereupon said Circuit court did on said day enter an order discharging said writ and remanding your petitioner to the custody of said marshal, from which said order your petitioner on the said day prayed for, obtained and perfected an appeal of the Circuit Court of Appeals of the United States in and for the Seventh circuit, and by an order entered by said court your petitioner was on said 28th day of November, 1894, enlarged, pending said appeal, upon a recognizance in the sum of twelve thousand dollars ($12,000), duly entered into by your peti-

tioner in the form and with the sureties approved by said Circuit court.

Your petitioner further says that thereafter and within the time required by law your petitioner caused a duly authenticated transcript of the record of said *habeas corpus* proceeding to be filed in the United States Circuit Court of Appeals for said Seventh circuit, in which said court said appeal was duly heard and such proceedings were had thereon that said Circuit Court of Appeals did on the 7th day of October, A. D. 1895, dismiss the appeal of your petitioner from the said order of said Circuit court, discharging said writ of *habeas corpus* and remanding your petitioner to the custody of said marshal, all of which matters and things will more fully appear by the duly authenticated transcript of the record of said Circuit Court of Appeals in said cause herewith filed and made by reference a part of this petition.

Your petitioner further says that your petitioner based his claim to a discharge from said arrest under said writ of *capias ad satisfaciendum* upon a certain act of the General Assembly of the State of Illinois, passed June 17, 1893, and approved July 1, A. D. 1893, entitled "An "Act to provide a trial by jury in all cases where a judg- "ment may be satisfied by imprisonment," which act provides as follows:

"That no person shall be imprisoned for non-payment "of a fine or a judgment in any civil, criminal, *quasi* "criminal or *qui tam* action, except upon conviction by "jury; *Provided*, that the defendant or defendants in "any such action may waive a jury trial by executing a "formal waiver in writing: *And, provided, further*, that "this provision shall not be constructed to apply to fines "inflicted for contempt of court: *And, provided, further*,

" that when such waiver of jury is made, imprisonment " may follow judgment of the court without conviction " by a jury."

Your petitioner further says that neither your petitioner nor his co-defendant ever waived a jury trial in said action by executing a formal waiver in writing, but that the record in said cause shows that said cause was tried by the court without the intervention of a jury in pursuance of an oral consent of the attorneys of the defendants to a trial before the Hon. Romanzo Bunn, District Judge, and that the only stipulation in writing waiving a trial by jury ever filed in said cause was one signed by the attorneys of the respective parties and not by the defendants, or either of them, which said stipulation expressly specified that said cause should be tried by Judge Grosscup.

Your petitioner further says that as appears from its opinion said Circuit Court of Appeals based its judgment dismissing the appeal of your petitioner from said order of said Circuit court, discharging said writ and remanding your petitioner to the custody of said marshal upon the ground that said statute last mentioned was not applicable to judgments of the courts of the United States sitting in the State of Illinois.

Your petitioner further says that your petitioner is advised by counsel and verily believes that the question presented in the said *habeas corpus* proceeding and decided by said Circuit Court of Appeals is of sufficient importance to justify its being reviewed and determined by this honorable court, in this that the said question is in substance whether the laws of the several states of the United States are binding upon the courts of the United States sitting in such states so far as such laws regulate the rights of the parties with respect to executions against

the body in actions *ex delicto*, and that your petitioner is advised by counsel that there is reasonable ground to believe that the judgment of said Circuit Court of Appeals, dismissing said appeal was and is erroneous.

Your petitioner further says that your petitioner is advised by counsel and believes that your petitioner is not entitled as of right to prosecute an appeal to this honorable court, or a writ of error from this honorable court to review the judgment of said Circuit Court of Appeals dismissing the said appeal of your petitioner from said order of said Circuit court, discharging said writ of *habeas corpus* and remanding your petitioner to the custody of said marshal and that your petitioner can only obtain a review by this court of the judgment of said Circuit Court of Appeals by means of a writ of *certiorari*, to be issued by this court requiring said Circuit Court of Appeals to certify said cause to this court for review.

Wherefore, your petitioner prays that this honorable court may, by *certiorari* or otherwise, require said Circuit Court of Appeals of the United States for the Seventh circuit to certify to this honorable court for its review the said case of your petitioner and that an order may be entered herein enlarging your petitioner on recognizance until the further order of this court. And as in duty bound your petitioner will ever pray, etc.

RUDOLPH DEIMEL.

H. T. GILBERT,
Of Counsel.

UNITED STATES OF AMERICA, NORTHERN DISTRICT OF ILLINOIS, NORTHERN DIVISION.

Rudolph Deimel, being first duly sworn, on his oath deposes and says that he is the petitioner in the foregoing petition; that he has read the same and knows the con-

tents thereof, and that the matters and things therein set forth are true in substance and in fact.

RUDOLPH DEIMEL.

Subscribed and sworn to before me this 12th day of February, A. D. 1896.

GEORGE M. ECKELS,
[SEAL.] *Notary Public.*

To Messrs. T. A. Moran and Levy Mayer, attorneys for the respondent:

You are hereby notified that on Monday, March 2, 1896, we shall move, in the Supreme court of the United States at Washington, that a writ of *certiorari* issue, as prayed for in the foregoing petition.

CHICAGO, Illinois, February 11, 1896.

HIRAM T. CILBERT,
Attorney for Petitioner.

Received a copy of the foregoing petition and notice this 12th day of February, A. D. 1896.

T. A. MORAN,
LEVY MAYER,
Attys. for Respondent.

Office Supreme Court U. S.
FILED.
FEB 27 1896
JAMES H. McKENNEY,
CLERK.

IN THE

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No. 913

UNITED STATES OF AMERICA ex rel.
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vs.

JOHN W. ARNOLD, United States Marshal
for the Northern District of Illinois.

Application for *Certiorari* to Circuit Court of Appeals for the Seventh Circuit.

ARGUMENT IN SUPPORT OF APPLICATION.

HIRAM T. GILBERT,

FOR THE APPLICANT.

BARNARD & MILLER, PRINTERS.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1895.

UNITED STATES OF AMERICA ex rel. RUDOLPH DEIMEL vs. **JOHN W. ARNOLD, United States Marshal for the Northern District of Illinois.**	Application for *Certiorari* to Circuit Court of Appeals for the Seventh Circuit.

ARGUMENT IN SUPPORT OF APPLICATION.

MAY IT PLEASE THE COURT:

This application is made for the purpose of bringing before this court for review a judgment of the Circuit Court of Appeals for the Seventh Circuit, dismissing an appeal from an order of the Circuit Court for the Northern Division of the Northern District of Illinois, discharging a writ of *habeas corpus* and remanding the applicant for the writ to the custody of the marshal. The question decided by the Circuit Court of Appeals, and upon which the opinion of this court is now sought is, whether the statutes of the several states, so far as they regulate the enforcement of judgments in actions *ex delicto*, by executions against the body, are binding in all cases, upon the courts of the United States sitting within those states. The decision of the Circuit Court of Appeals was in the negative.

The application for the writ of *habeas corpus* was made

to the Circuit court for the purpose of securing the discharge of the applicant, Rudolph Deimel, from imprisonment under a writ of *capias ad satisfaciendum*, issued upon a judgment of that court against him and another in an action for deceit, the ground of the application being that such imprisonment was in violation of the act of June 17, 1893, entitled "An act to provide a trial by "jury in all cases where a judgment may be satisfied by "imprisonment." (Laws of Illinois of 1893, page 96), which provides as follows:

"That no person shall be imprisoned for non-payment "of a fine or a judgment in any civil, criminal, *quasi* "criminal or *qui tam* action, except upon conviction by "jury; *Provided*, that the defendant or defendants in any "such action may waive a jury trial by executing a formal "waiver in writing: *And, provided, further*, that this "provision shall not be construed to apply to fines in- "flicted for contempt of court: *And, provided, further*, "that when such waiver of jury is made, imprisonment "may follow judgment of the court without conviction "by a jury."

The contention of the applicant was that this statute by virtue of the provisions of the Revised Statutes of the United States was binding upon the Circuit court, and limited its power to imprison the defendant for non-payment of a judgment in a civil suit to a case where the defendant had waived a jury trial "by executing a "formal waiver in writing," that the defendant had not executed such "formal waiver in writing," and that therefore his imprisonment under the *capias ad satisfaciendum* was unlawful. The facts, as they appear from the record, are as follows:

The action in which the *capias ad satisfaciendum* was

issued was an action on the case for deceit. On January 9, 1893, the issues having been made up, the following stipulation in writing was filed:

"In the Circuit Court of the United States,
"Northern District of Illinois,
"Northern Division.

"Julius Stroheim and Salo J. Stroheim
vs. } *Case.*
"Joseph Deimel and Rudolph Deimel.

"It is hereby stipulated and agreed by and between "the parties that a trial by jury in the above entitled "cause shall be waived, and that the said cause shall be "submitted to the court for trial *to be tried by Judge "Grosscup.*

"Moran, Kraus & Mayer,
"*Attorneys for Plaintiffs.*
"Duncan & Gilbert,
"*Defendants' Attorneys.*"

On March 26, 1894, as appears from the bill of exceptions (Rec., 7-11), the cause was called for trial before the Honorable Romanzo Bunn, who was then presiding in the Circuit court. Objection was made by the defendants to the trial of the case before Judge Bunn on the ground that the foregoing stipulation was the only one filed waiving a jury, and that under that stipulation Judge Bunn was not authorized to try the case, because the stipulation upon its face showed that the waiver of a trial by jury was made only for the purposes of a trial before a particular judge, to wit: Judge Grosscup, named in the stipulation. This objection was overruled on the ground that the defendants, *by their counsel*, had

expressly upon several different occasions prior to March 28, 1894, in open court orally consented and agreed that the case might and should be tried before Judge Bunn without a jury. The trial of the case was then proceeded with, and resulted in a finding and judgment in favor of the plaintiffs for the sum of $8,500.

The findings of fact signed by Judge Bunn (Rec., 23) contain the following recital:

"This cause coming on now to be heard before the "court without the intervention of a jury, *a jury having* "*heretofore been expressly waived by stipulation in* "*writing of all the parties hereto, which said stipula-* "*tion was heretofore duly filed herein by the attorneys* "*of record for the parties to this suit with the clerk of* "*this court,* and the court having heard the proofs and "the allegations of the parties and the arguments of "counsel, finds therefrom:"

The judgment entry in the case (Rec., 27) contains the following recital:

"*On the stipulation in writing of all the parties here-* "*to heretofore duly filed herein by the attorneys of rec-* "*ord for the parties to this suit with the clerk of this* "*court, this cause is submitted to the court for trial* "*without the intervention of a jury*, and the court now, "after hearing all the evidence adduced, the arguments "of counsel, and being duly advised in the premises, "finds the defendants, Joseph Deimel and Rudolph "Deimel, guilty, and assesses the plaintiffs' damages at "the sum of $8,500."

The bill of exceptions taken upon the trial, and signed by Judge Bunn, recites that the above stipulation for the trial of the case before Judge Grosscup was "the only

"stipulation or waiver in writing filed in said cause for "the submission of said cause for trial without a jury," and its other recitals show that the trial before Judge Bunn was had, not in pursuance of such stipulation in writing, but because of the oral consent of defendants' counsel given in open court. (Rec., 21, 22.)

The writ of *habeas corpus* having been discharged and the applicant remanded to the custody of the marshal by the Circuit court, an appeal was prosecuted to the Circuit court of Appeals for the Seventh circuit, which appeal was heard in connection with a writ of error sued out by the defendants to secure a review of certain rulings of the Circuit court in the original suit, denying motions to amend the record and to quash the *capias ad satisfaciendum*, and resulted in the dismissal of the appeal from the order of the Circuit court discharging the writ and remanding the applicant to the custody of the marshal.

The Circuit court of Appeals based its judgment dismissing the appeal solely on the ground that the statute of the State of Illinois above referred to and quoted was not applicable to judgments of the courts of the United States sitting in Illinois, and in support of its conclusion, (Rec., 43–45), gave the following reasons:

"A review, in detail, of the various acts of Congress "authorizing and regulating process out of the courts of "the United States is unnecessary here. Section 14 of "the Judiciary Act of 1789 authorized the courts to "issue 'the writs of *scire facias*, *habeas corpus*, and "all the other writs not specially provided for by "statute, which may be necessary for the exercise of "their respective jurisdictions and agreeable to the "principles and usages of law.' In *United States* "*Bank* v. *Halstead*, 10 Wheat., 51, 55, it was said:

" 'That executions are among the writs hereby author-
" ized to be issued cannot admit of a doubt; they are
" indispensably necessary for the beneficial exercise of
" the jurisdiction of the courts. . . . The precise
" limitations and qualifications of this power, under the
" terms agreeable to the principles and usages of law, is
" not, perhaps, so obvious. It, doubtless, embraces
" writs sanctioned by the principles and usages of the
" common law. But it would be too limited a construc-
" tion, as it respects writs of execution, to restrict it to
" such only as were authorized by the common law. It
" was generally known to Congress that there were in
" use in the State courts writs of execution other than
" such as were conformable to the usages of the common
" law. And it is reasonable to conclude that such were
" intended to be included under the general description
" of writs agreeable to the principles and usages of law.'
" It follows that under this provision of the act estab-
" lishing Federal courts, which remains in force as Sec-
" tion 716 of the Revised Statutes, those courts had
" from the beginning the power to issue the writ of *capias*
" *ad satisfaciendum*. That writ is expressly mentioned
" in the process act enacted five days after the passage
" of the judiciary act, and in later legislation on the
" same subject, and whatever restrictions there may be
" upon the use of the writ must be found directly or in-
" directly in the Federal statutes. If state legislation
" has any bearing it is because Congress has so provided.
" Section 914 of the Revised Statutes, known as the con-
" formity act, even if it had not been declared to be in-
" applicable to remedies upon judgments, *Lamaster* v.
" *Keeler*, 123 U. S., 376, could not be deemed to give
" effect to this statute of Illinois, because by Section 649

" of the Revised Statutes the stipulation for the waiver " of a jury may be filed either by the parties or their at- " torneys, and the finding of the court upon those facts, " whether general or special, it is provided 'shall have " the same effect as the verdict of a jury.' (See *ex parte* " *Fisk*, 113 U. S., 710.) It has been suggested that " this provision has reference only to the right of appeal, " but manifestly that is not so, since that right is given " and limited by another section, namely: Section 700 " of the Revised Statutes. There is nothing to the con- " trary in *Kearney* v. *Case*, 12 Wall., 275, or in *Gilman* " v. *Ill. & Miss. Tel. Co.*, 91 U. S., 603. Once pro- " cess has issued, Section 914, it has been declared, is " applicable to the conduct of the officer in the " execution thereof. (*Wyman* v. *Southard*, 10 " Wheat., 1.) Section 916 of the Revised " Statutes entitled a party recovering a judgment in any " common law cause 'to similar remedies upon the same, " by execution or otherwise, to reach the property of " the judgment debtor, as are now provided in like " causes by the laws of the state in which such court is " held,' etc., but that provision by its terms is inapplicable " to an execution against the body of the debtor. If, " however, the writs against person and property be re- " garded as governed by the same rule, and required to " conform in the first instance to local legislation, both " have been authorized by the laws of Illinois from the " earliest days, and as issued out of the federal courts " they are not governed or affected by changes in the " state law on the subject unless the changes have been " adopted by general rules of those courts. Imprison- " ment for debt has been forbidden on process issuing " from a court of the United States in any state where,

"by the local law, imprisonment for debt has been or "shall be abolished, and all modifications, conditions "and restrictions upon such imprisonment provided by "the laws of any state are made applicable to federal "process to be executed therein, Revised Statutes, Sec. "990, but imprisonment for debt, as used in this and "like statutory or constitutional provisions, means debts "arising out of contract, and does not extend to actions "for tort, nor to fines or penalties arising from a viola- "tion of the penal laws of the state. It was so held "by the Supreme Court of Illinois in *Kennedy* v. *People*, "122 Ill., 649, and to the same effect are *Hanson* v. "*Fowle*, 1 Sawyer, C. C. 497; *U. S.* v. *Walsh*, 1 Abb. "C. C. 66; *Ex Parte Bergman*, 18 Nev., 331; *Harris* "v. *Bridgers*, 57 Ga., 407; *McCool* v. *State*, 23 Ind., "131; *Long* v. *McLean*, 88 N. C. 4; *Lathrop* v. *Swiger*, "39 Barb. 396; Cooley Const. Lim. 341, 4th Ed. "422."

Such being the nature of the case, and the point decided by the Circuit Court of Appeals, is the case one in which this court ought to exercise its power of requiring it to be certified here for review?

In the case of *Lau Ow Bew*, 141 U. S., 583, this court said:

"It is evident that it is solely questions of gravity and "importance that the Circuit Court of Appeals should cer- "tify to us for instruction; and that it is only when such "questions are involved that the power of this court to "require a case in which the judgment and decree of the "Court of Appeals is made final to be certified can be "properly invoked. The inquiry upon this application, "therefore, is whether the matter is of sufficient import- "ance in itself, and sufficiently open to controversy to

" make it the duty of this court to issue the writ applied " for in order that the case may be reviewed and deter- " mined as if brought here on appeal or writ of error."

We shall, therefore, present as briefly as possible our reasons why we think it the duty of this court to review the judgment of the court below, by discussing the following questions:

First. Is the question involved sufficiently important?

Second. Is the question involved sufficiently open to controversy?

I.

IS THE QUESTION INVOLVED SUFFICIENTLY IMPORTANT?

While it may ordinarily be in and of itself alone of comparatively little importance whether a defendant in a civil suit be or be not imprisoned under a writ of *capias ad satisfaciendum*, it cannot be doubted that it must always be of the utmost importance whether a Federal court is justified in disregarding a law of the state within which it sits and in meting out to a citizen of another state a measure of justice which, were he a citizen of the state, he could not obtain in its own courts. Especially is this true when such disregard of state legislation is based upon a technical construction of a Federal statute the manifest purpose of which, as evidenced by its language and history, was to require strict conformity on the part of the Federal courts with the provisions embodied in the law in question.

Whether it is well founded or not, it is a matter of common notoriety, that complaint is frequently made that the Federal courts manifest a disposition to disregard

those state laws and those decisions of state courts mitigating the harshness of the common law towards debtors who are unable to pay their debts, and to indulge in a degree of severity toward debtors that state courts would not, by state laws, be permitted to indulge in. That such a complaint, if it appears to have any foundation at all, is sufficiently important to be worthy of investigation by this court, cannot, it seems to us, be successfully denied. At all events, we respectfully submit, that the question whether a Chinaman can be properly excluded from the United States is of no greater importance for the purpose of demanding the consideration of this court, than is the question whether an American citizen can be imprisoned for debt under process issued from a Federal court when, under the same circumstances, he could not be imprisoned under process of a state court.

The importance of the question involved in this case, for the purpose of its consideration by this court results, in our judgment, from the circumstance that the decision of the Circuit court of Appeals is in substance and effect, that the laws of the several states are not binding upon the courts of the United States sitting in such states so far as such laws regulate the rights of parties with respect to executions against the body in actions *ex delicto*, and that such decision affects not only the case at bar, but also a large class of cases, which may arise not only in the State of Illinois, but in each of the other states of the Union. From such a decision it would seem to follow that although a law of a state prohibits the imprisonment of a defendant for the purpose of satisfying any judgment in a civil action, whether *ex contracto* or *ex delicto*, a non-resident of such state, by suing in a federal court, may, in an action *ex delicto*, secure an execution under

which the defendant may be imprisoned for such purpose, and that, although the law of a state may limit the time during which, or may specify the circumstances under which, a defendant may be imprisoned in satisfaction of a judgment founded upon a tort, such limitation as to time, or specifiation of circumstances, is not binding upon a federal court sitting within the same state, in the enforcement of a similar judgment rendered by it in a suit brought by a citizen of another state against a citizen of the state in which the court is held.

While it is undoubtedly within the power of Congress to confer upon the federal courts authority to enforce the payment of a judgment in a civil suit by imprisonment of the defendant, notwithstanding the laws of the several states may forbid such method of enforcement, yet when we consider that the main and perhaps the only purpose of the framers of the constitution in providing that a non-resident of a state might sue in a federal court was, not to secure to him a better remedy than that afforded to the citizen of a state suing in its own courts, but to relieve him from the disadvantage that might result from local prejudice in favor of the defendant, and as the general policy indicated by congressional legislation seems to be in accord with such purpose, we ought to hesitate before so construeting the statutes of the United States as to furnish to a plaintiff suing in the federal courts a remedy by imprisonment of the defendant that would be denied the plaintiff were he a resident of the state in which the suit is brought.

In order that the court may appreciate and understand the nature of the remedies by imprisonment afforded by the laws of Illinois to its citizens suing in its courts, we shall now cite and quote the statutes bearing upon that subject.

Section 5 of Chapter 77, Revised Statutes of Illinois, 1874, is as follows:

"No execution shall issue against the body of the defendant except when the judgment shall have been obtained for a tort committed by such defendant, or unless the defendant shall have been held to bail upon a writ of *capias ad satisfaciendum* (*respondendum*) as provided by law, or he shall refuse to deliver up his estate for the benefit of his creditors."

Section 1 of the Act of June 17, 1893, entitled, "An act to provide a trial by jury in all cases where a judgment may be satisfied by imprisonment," is as follows:

"That no person shall be imprisoned for non-payment of a fine or a judgment in any civil, criminal, *quasi* criminal, or *qui tam* action, except upon conviction by jury; *provided*, that the defendant or defendants in any such action may waive a jury trial by executing a formal waiver in writing; *And, provided, further*, that this provision shall not be construed to apply to fines inflicted for contempt of court; *And, provided further*, that when such waiver of jury is made, imprisonment may follow judgment of the court without conviction by a jury."

Section 2 of Chapter 73, Revised Statutes of Illinois, 1874, is as follows:

"When any person is arrested or imprisoned upon any process issued for the purpose of holding such person to bail upon any indebtedness, or in any civil action when malice is not the gist of the action, or when any debtor is surrendered or committed to custody by his bail in any such action, or is arrested or imprisoned upon execution in any such action, such person may be

" released from such arrest or imprisonment upon com-
" plying with the provisions of this act."

Subsequent sections of the act provide for an application by the defendant to the county court for his discharge, the trial before that court of the issue of fraud on the part of the defendant or of fraudulent refusal by him to surrender his estate for the payment of the judgment, the scheduling of his property, the assignment thereof to an assignee, and the discharge of the defendant in case the issue of fraud or fraudulent refusal is found in his favor, and he delivers to the assignee the property assigned. As these provisions of the act have no application to a case where, as here, malice is the gist of the action, and have no material bearing upon the question now under consideration, we do not deem it necessary to set them forth in full.

Sections 30, 31 and 34 of the same chapter as amended by an act approved June 14, 1874, are as follows:

" SEC. 30. In all cases where any person is com-
" mitted to the jail of any county upon any writ of
" *capias ad respondendum*, or *capias ad satisfaciendum*
" issued in any suit, it shall be the duty of the creditor
" in such writ to pay the keeper of the jail or sheriff his
" fees for receiving such person, and his board for one
" week at the time the debtor is committed to jail and
" before the jailer shall be bound to receive the debtor,
" and in default of such payment the debtor may be dis-
" charged: *Provided*, the officer having such debtor in
" charge shall give reasonable notice to the creditor or
" his agent or attorney, if within the county, that such
" debtor is about to be committed to jail on such writ."

" SEC. 31. Should the debtor be detained in jail
" under such writ for more than one week, it shall be

"the duty of the creditor, at the commencement of "each week, to advance to such jailer the board of the "debtor for the succeeding week, and in default of such "payment in advance, the debtor may be discharged by "such jailer. In case the debtor shall not be detained "in such jail for any week for which his board may "have been paid in advance, the jailer shall return to "the creditor, or his agent or attorney, the amount so "advanced for and unexhausted in boarding."

"SEC. 34. In any case where the defendant arrested "upon final process shall not be entitled to relief under "the provisions of this act, if the plaintiff will advance "the jail fees and board in manner hereinbefore provided, "the defendant may be imprisoned at $1.50 per day "until the judgment shall be satisfied, and the officer "making the arrest shall endorse the execution 'satisfied "in full by imprisonment.' *Provided*, that no person "heretofore or hereafter imprisoned under the provisions "of this act, shall be imprisoned for a longer period than "six months from the date of arrest; and all persons im-"prisoned under the provisions of this act for the period "of six months or more at the time this act takes effect, "shall thereupon immediately be discharged. *Provided*, "*however*, that no person shall be released from impris-"onment under this act who neglects or refuses to "schedule in manner and form as provided by this act."

From these provisions of the Statutes of Illinois the following conclusions result:

1. A defendant can in no case be imprisoned for non-payment of a judgment in any civil suit excepting upon conviction by a jury, or unless he has waived a trial by jury by executing a formal waiver in writing.

2. A defendant lawfully imprisoned under a *capias ad satisfaciendum* issued upon a judgment in any action

ex delicto can in no event be imprisoned thereunder for a longer period than six months from the date of arrest, and he may be discharged at an earlier date because of default on the part of the judgment creditor in the payment, in the manner provided by statute, of the fees of the jailer for receiving and boarding the defendant.

Such being the rights accorded to a plaintiff who has obtained a judgment in an action *ex delicto* in a court of the state, the contention that a plaintiff who has obtained a judgment in a federal court sitting in the same state, is entitled to imprison a defendant for non-payment of a judgment without a trial by jury, and without the execution by the defendant of a formal waiver in writing, is one which presents for consideration a question of importance, inasmuch as such a construction of the law would seem to carry with it the necessary consequence that other provisions of the state statutes, such as one limiting the time during which a defendant may be imprisoned under a *capias ad satisfaciendum*, are not binding upon the federal courts, or, in other words, that the defendant in a judgment rendered in a federal court in an action for a tort may be imprisoned for life, notwithstanding the law of the state in which such federal court sits limits such imprisonment to six months in the case of a judgment of the same character rendered by the state court.

As to the other questions presented by the record and not decided by the Circuit Court of Appeals we assume that it is not necessary that we discuss them upon this application As that court has seen fit to base its judgment solely upon the ground that the Statute of Illinois was not binding upon the Circuit Court of the United States sitting in that state, and as its opinion will form the basis for future rulings of the same character, we may safely

assume that the conclusion of this court with respect to the issuance of the writ of *certiorari* will depend upon its views as to the importance of the proposition announced by the Circuit Court of Appeals, and that a discussion by us of the other questions presented by the record may be safely left for the argument of the cause upon its merits, in case the the writ prayed for is allowed.

II.

Is the question involved sufficiently open to controversey?

Having discussed this question in our argument filed in the Circuit Court of Appeals in support of our petition for a rehearing and feeling that we cannot present our view more satisfactorily than they are there presented, we have deemed it proper to append that argument hereto and ask the court to consider it upon this application. While we regret the length of the argument, we yet believe that a full presentation of the case, requiring as it does the consideration of numerous statutes which are for the convenience of the court, printed as an appendix, renders it impracticable to properly discuss the question presented less fully than we have discussed it in that argument.

Should the court conclude that the question presented in one of sufficient importance to justify a review of the judgment of the Circuit Court of Appeals, we ask that an order be entered enlarging the applicant upon recognizance pending the final determination of the case by this court.

Hiram T. Gilbert,

For the Applicant.

IN THE

United States Circuit Court of Appeals

FOR THE SEVENTH CIRCUIT.

OCTOBER TERM, A. D. 1895.

United States of America ex rel. Rudolph Deimel *vs.* **John W. Arnold, United States Marshal.**	Appeal from Circuit Court, Northern Division of Northern District of Illinois.
Joseph Deimel and Rudolph Deimel *vs.* **Julius Stroheim and Salo J. Stroheim.**	Error to Circuit Court, Northern Division of Northern District of Illinois.

ARGUMENT IN SUPPORT OF
PETITION FOR A REHEARING.

MAY IT PLEASE THE COURT:

Further investigation of the adjudged cases and statutory provisions relating to the questions involved in this case has satisfied us that some additional light may be furnished the court, and its labor in the consideration of the application for a rehearing may be lessened by a revision of the argument contained in the petition. Accordingly we have prepared this argument as a substitute for that contained in the petition, adding as we did to the petition, an appendix containing in full those statutory

provisions which we have regarded as necessary to be considered by the court in order that it may arrive at a correct determination of the matter in controversy.

The conclusions of the court, as stated in its opinion, are, in brief, that "imprisonment for debt" as used in Section 990 means imprisonment for debt arising out of contract, and consequently that section does not apply to the case at bar; that Section 914 is not applicable to remedies upon judgments, but even if it were, compliance or conformity with the Illinois statute of 1893 would be inconsistent with Section 649; that a writ of *capias ad satisfaciendum* is authorized by Section 716 and, as there are no other provisions in the Revised Statutes directly or indirectly restricting its use, it was properly issued in the case at bar. We shall endeavor to show that these conclusions are erroneous and shall contend:

First, that Sections 990 and 991 of the Revised Statutes entitle the appellant to discharge from his imprisonment.

Second, that Section 914, when considered by itself alone, would also entitle appellant to discharge from his imprisonment.

Third, that Section 914 is not limited by Section 716.

Fourth, that Section 914 is not limited by Section 916.

Fifth, that Section 914 is not limited by Section 649.

Sixth, that the provisions of the Revised Statutes, when considered in the light of their history, show that Congress intended to require strict conformity by the courts of the United States with state legislation regulating imprisonment both under judgments founded on contract and under those founded on tort.

I.

SECTIONS 990 AND 991 OF THE REVISED STATUTES ENTITLE THE DEFENDANT TO DISCHARGE FROM HIS IMPRISONMENT.

The language used in sections 990 and 991 is as follows:

"SEC. 990. No person shall be imprisoned for debt "in any state, on process issuing from a court of the "United States, where, by the laws of such state, im- "prisonment for debt has been or shall be abolished. "And all modifications, conditions and restrictions upon "imprisonment for debt provided by the laws of any "state, shall be applicable to the process issuing from "the courts of the United States to be executed therein; "and the same course of proceedings shall be adopted "therein as may be adopted in the courts of such "state."

"SEC. 991. When any person is arrested or impris- "oned in any state, on *mesne* process or execution issued "from any court of the United States, in any civil ac- "tion, he shall be entitled to discharge from such arrest "or imprisonment in the same manner as if he were so "arrested and imprisoned on like process from the courts "of such state. The same oath may be taken, and "the same notice thereof shall be required, as may be "provided by the laws of such state, and the same "course of proceedings shall be adopted as may be "adopted in the courts thereof. But all such proceed- "ings shall be had before one of the commissioners of "the circuit court for the district where the defendant is "so held."

The first question we shall discuss is whether the court is right in its conclusion that the word "debt" as used in section 990 was intended by Congress to mean only debts arising out of contract and not to include judgments in actions for tort, fines or penalties arising from a violation of the penal laws of the state.

In the determination of this question it is of great importance to ascertain whether Congress has not itself furnished a definition of the term "imprisonment for "debt" as used in its legislation respecting inprisonment on civil process, and, if so, what that definition is. If it appears that during a long period Congress used the word "debt" in such legislation as applicable to any judgment in a civil action whether founded on contract or on tort, that fact will at least be a very strong circumstance against the interpretation of the term as being used in the Revised Statutes in its restricted sense as meaning debt arising out of contract.

The first act passed by Congress relating to imprisonment on process in civil actions was the act approved May 5 1792. (1 Stat. at Large, 265. See Appendix, *post.*) Its title was "An act for the relief of persons "*imprisoned for debt.*"

If the term "imprisonment for debt" was understood by Congress to have the restricted meaning of imprisonment for *debt arising out of contract*, we should naturally expect to find the terms of this act limited accordingly. Such, however, is not the case. The first section of the act declares "that persons imprisoned on ex- "ecutions issuing from any court of the United States for "satisfaction of judgments, in *any civil actions* shall be "entitled to like privileges of the yards or limits of the re- "spective gaols as persons confined in such gaols for

" *debt on judgments* rendered in the courts of the several " states are entitled to, and under like regulations and " restrictions." The second section of the act provides that any person so imprisoned may be permitted to take the poor debtor's oath, upon the taking of which and the failure of the creditor to advance the amount required for the debtor's support, it is declared that " the debtor shall " be discharged from his imprisonment on such judg- " ment, and shall not be liable to be imprisoned again " for the same *debt*."

The term " civil action " is defined by Bouvier as " an " action which has for its object the recovery of private " or civil rights or compensation for their infraction." That it includes actions for torts as well as actions for debts is so well understood that its meaning does not admit of dispute. It follows, then, that by the terms of the act of May, 5, 1792, above referred to, persons imprisoned on executions issued upon judgments in actions for torts rendered by the courts of the United States were placed upon precisely the same footing, so far as the right release from imprisonment was concerned, as those imprisoned on executions issued upon judgments for debt arising out of contract. All judgment debtors, whether the judgments were founded upon torts or upon contracts, were given relief under an act which by its title purported to be one for the relief of " persons imprisoned " for *debt*."

The second act upon the subject was that of May 30, 1794, (1 Stat. at Large, 370. See Appendix, *post*), entitled " An act to continue in force the act for the relief " of persons *imprisoned for debt*." As this act was simply one continuing in force the former act until the end of the next session of Congress, it need not be noticed further.

The third act relating to imprisonment on process in civil actions was the act approved May 28, 1796, and entitled "An act for the relief of persons *imprisoned for* "*debt.*" (1 Stat. at Large, 482. See Appendix, *post.*) In this, as in the act of May 5, 1792, the persons entitled to relief are described as "persons imprisoned on process "issuing from any court of the United States *in civil* "*actions.*" The relief provided for, however, was different from that provided for in the former act in this, that the right to discharge from imprisonment upon the taking of the poor debtor's oath was made absolute instead of being conditioned upon the non-payment by the creditor of an amount required for the debtor's support. As in the prior act, so also in this, it was declared that upon the debtor being discharged he should "not be "liable to be imprisoned again for the same *debt.*" The third section of the act further provided that any person falsely taking the oath should be deemed guilty of perjury, and upon conviction thereof he should suffer the pains and penalties in that case provided, and also that "the "court, upon the motion of the *creditor*, shall recommit "the *debtor* to the prison from whence he was liberated, "there to be detained *for the said debt*," etc.

The fourth act relating to such imprisonment was that approved June 6, 1798, and entitled "An act supple-"mentary to an act entitled 'An act for the relief of "persons *imprisoned for debt.*'" (1 Stat. at Large, 562. See Appendix, *post.*) The person entitled to relief is described as "any person imprisoned upon process issuing "from any court of the United States in *any civil ac-*"*tion*," and the sole provision of the act is that such person shall be entitled to the relief specified in the former act, "after the expiration of thirty days from the time

"such judgment has been or shall be recovered, though "the creditor should not, within that time, sue out his "execution and charge the *debtor* therewith."

The fifth act relating to such imprisonment was the act approved June 6, 1798, and entitled "An act providing for "the relief of persons *imprisoned for debts due to the* "*United States.*" (1 Stat. at Large, 562. See Appendix, *post.*) The person entitled to relief is described as "any person imprisoned upon execution issuing from "any court of the United States for a *debt* due to the "United States which he shall be unable to pay," and the relief provided for is a discharge from imprisonment through an application to the Secretary of the Treasury. Although nothing contained either in the title or in the first two sections of this act would indicate that the word "debt," as used by Congress in its legislation, was meant to include any judgment, whether rendered upon a tort or upon a contract, the third section does contain almost conclusive evidence that it was so used in this, that it provides "that the benefit of this act shall not be ex- "tended to any person imprisoned for any *fine, forfeit-* "*ure* or *penalty incurred by a breach of any law of the* "*United States*, or for moneys had and received by any "officer, agent, or other person for their use." If, as is now insisted with reference to section 990, "imprison- "ment for debt, as used in this and like statutory or con- "stitutional provisions, means debts arising out of con- "tract, and does not extend to actions for tort, nor *to fines* "*or penalties arising from the violation of the penal* "*laws of the state*," why was it necessary for Congress to declare that a word, whose meaning is now claimed to be so plain, did not include *fines, penalties*, etc., etc., which, as every one should have known, were not included therein?

The sixth act relating to such imprisonment was the act approved January 6, 1800, and entitled "An act for "the relief of persons *imprisoned for debt.*" (2 Stat. at Large, 5. See Appendix, *post.*) The first section of this act secures the privileges of jail limits to "persons "imprisoned on process issuing from any court of the "United States, as well at the suit of the United States "as at the suit of any person or persons in *civil ac-* "*tions,*" while the second section provides for the administration of the poor debtor's oath to and the discharge "of any person imprisoned on process of execution issuing "from any court of the United States in *civil actions,* "except at the suit of the United States," and declares that when the debtor is so discharged from his imprisonment he "shall not be liable to be imprisoned again for "the said *debt.*" The fourth section, like the third section of the act of May 28, 1796, *supra*, designates the parties as *debtor* and *creditor*, and also uses the phrase, "there to be detained *for the said debt.*" The fifth section contains the same description as does the second of the person imprisoned, and declares he shall be entitled to the relief within thirty days after judgment though execution be not sued out within that time.

The seventh act relating to such imprisonment was that approved March 3, 1817, and entitled "An act sup- "plementary to 'An act for the relief of persons im- "prisoned for *debts* due to the United States.'" (3 Stat. at Large, 399. See Appendix, *post.*) This act provides that "any person imprisoned upon execution for a *debt* "due to the United States, which he shall be unable to "pay, *if his case shall be such as does not authorize his* "*discharge by the Secretary of the Treasury under the* "*powers given him*" by the previous act, may make

application to the President of the United States, who may order his discharge. The previous act, being the one approved June 6, 1798, withheld the right to discharge from "any person imprisoned for any *fine*, *forfeiture* or *penalty* incurred by a breach of any law of "the United States," etc., and this was the class of cases included in the description, "such as does not authorize his discharge by the Secretary of the Treasury "under the powers given him" by the former act.

Thus we see that Congress not only deemed it necessary in the former act to provide in express terms that the relief mentioned in the first section to "any person "imprisoned * * * for a *debt* due to the United "States" should not extend to "any person imprisoned "for any *fine*," etc., and thereby interpreted "debt," when used without explanation or limitation, to include such *fine*, etc., but it also, in the later act, declared that the cases in which the Secretary of the Treasury was not authorized to discharge, to wit: cases of *fines*, *penalties* and *forfeitures*, were cases of imprisonment for "*debt* "due to the United States."

The eighth act relating to such imprisonment was the act approved January 7, 1824, entitled, "An act supplemen-"tary to the act entitled, 'An act for the relief of per-"sons imprisoned for debt,'" (4 Stat. at Large 1. See Appendix, *post*), and the ninth act was the act approved April 22, 1824, and entitled, "An act supplementary to "the act entitled 'An act supplementary to the act "entitled 'An act for the relief of persons imprisoned "for debt.'" (4 Stat. at Large 19. See Appendix, *post.*)

As there is nothing in the body of either of these acts shedding any additional light upon the sense in which

Congress used the term "imprisonment for debt," they need not be further commented on.

As the law regulating imprisonment under process issuing out of the courts of the United States in civil actions continued to be that embodied in the acts of June 6, 1798 and January 6, 1800, as amended by the subsequent statutes referred to, until February 26, 1839, excepting so far as modified by the process acts of September 28, 1789, May 8, 1792 and May 19, 1828, which will be commented on hereafter, it seems to us no reasonable doubt can exist as to the sense in which Congress, up to February, 26, 1839, understood and intended the courts of the United States should understand, the term "im-" prisonment for debt." Finding as we do, that, while every one of these numerous acts of Congress declares by its title that it is one "for the relief of persons im-" prisoned for *debt*," it either expressly declares the relief open to all persons imprisoned on process in civil actions, or expressly excepts from its operation certain cases which are not cases of "debt" within the strict sense of that term as used in the constitutions of various states, what other conclusion is admissible than that Congress regarded all judgments as debts and every case of imprisonment under a judgment in a civil action as a case of imprisonment for debt?

But the fact that Congress, during this long period of time, used the expression "persons imprisoned for debt" in the sense of "persons imprisoned under executions in "civil actions," is not the only one to be considered in determining whether it shall be given the same sense in Section 990. On the contrary, the absurd result that would follow the strict construction now sought to be given to the language of Section 990 and the construc-

tion given by the court to other provisions of the Revised Statutes, so far as they relate to executions against the body in actions founded on tort, is a far more important consideration.

Whatever may have been the meaning attached by Congress to the words "persons imprisoned for debt," as used in the title of the acts referred to, passed prior to 1839, there can be no doubt whatever that the effect of the bodies of those acts was to place imprisonment under executions upon judgments founded on tort on precisely the same footing with imprisonment under executions upon judgments founded on contract. Every judgment debtor, regardless of whether the judgment was founded on contract or on tort, was entitled by the terms of those acts to absolute discharge from imprisonment upon taking the poor debtor's oath and after thirty days previous notice to the judgment creditor.

Such being the law in force from 1796 down to 1839, excepting as modified by the process act of May 19, 1828, to be hereafter referred to, is it reasonable to conclude that the acts of February 26, 1839 (5 Stat. at Large, 321, see Appendix *post*), January 14, 1841 (5 Stat. at Large, 410, see Appendix *post*), and March 2, 1867 (14 Stat. at Large, 543, see Appendix *post*), which now constitute Sections 990 and 991 of the Revised Statutes, were intended to express so radical a change of policy on the part of Congress upon the subject of imprisonment in civil actions as would result from provisions which, while requiring strict conformity to state laws in cases of imprisonment for debt arising out of contract, revive, so far as judgments for torts are concerned, the heartless method of imprisonment in force in the last century?

Truly such a construction of the law would bring, so far as actions founded on tort were concerned, that "return to ancient usage and just as well as wise principles" evidently desired by Chief Justice MARSHALL when, in delivering the opinion of the court in *Wayman* v. *Southard*, 10 Wheat., 46, he said:

"Congress, at the introduction of the present government, was placed in a peculiar situation. A judicial system was to be prepared, not for a consolidated people, but for distinct societies, already possessing distinct systems, and accustomed to laws which, though originating in the same great principles, had been variously modified. The perplexity arising from this state of things was much augmented by the circumstance that, in many of the states, the pressure of the moment had produced deviations from that course of administering *justice between debtor and creditor*, which consisted, not only with the spirit of the constitution, and, consequently, with the views of the government, but also with what might safely be considered as the permanent policy, as well as interest, of the states themselves. The new government could neither entirely disregard these circumstances, nor consider them as permanent. In adopting the temporary mode of proceeding with executions then prevailing in the several states, it was proper to provide for that return to *ancient usage, and just as well as wise principles*, which might be expected from those who had yielded to a supposed necessity in departing from them. Congress, probably, conceived that this object would be best effected by placing in the courts of the Union the power of altering the 'modes of proceeding in suits at common law,' which includes the modes of proceeding

" in the execution of their judgments, in the confidence " that, in the exercise of this power, the *ancient, per-* " *manent and approved system* would be adopted by the " courts, at least as soon as it should be restored in the " several states by their respective legislatures. Con- " gress could not have intended to give permanence to " temporary laws of which it disapproved; and, there- " fore, provided for their change in the very act which " adopted them."

The "*ancient, permanent and approved system,*" referred to by the learned Chief Justice, was that described by Justice HYDE, when, in delivering his opinion, in *Many* v. *Scott*, 1 Mod., 132, he said:

" If a person be taken in execution and lie in prison " for debt, he is not to be provided with meat, drink or " clothes, but he must live on his own, or on the charity " of others; and if no man will relieve him, let him die " in the name of God, says the law, and so say I."

We respectfully submit that no sufficient ground can be shown for giving to the words " persons imprisoned " for debt" or " imprisonment for debt," as used in Section 990, any different meaning than they evidently were intended to have in acts of Congress extending over a period of thirty years. The technical construction now sought to be given the term " imprisonment for debt " is based upon and is the result of the decisions of state courts construing the language of state constitutions adopted long after those words, as used in the acts of Congress, had acquired a meaning which included all cases of imprisonment in civil actions. To follow those decisions of the state courts it is necessary to hold that congress when, in 1839, it used the term " imprisonment for " debt " intended to abandon its own previous definition

of the term, which had been acted on for over forty years, and adopt the new and restricted meaning furnished by the decisions of the state courts.

In this connection we might also suggest that the construction placed by some of the state courts upon the term "imprisonment for debt," found in state constitutions, may well be attributed to the same hostility to legislation for the relief of the debtor class that led Chief Justice Marshall to indicate his preference for "the an-"cient, permanent and approved system," and which led the courts of the United States to the strict construction of the acts of Congress above referred to.

No other rational explanation can be given of the view entertained by those state courts, that imprisonment for the purpose of enforcing the payment of a judgment *was* imprisonment for debt, when the judgment was founded on a contract, but was *not* imprisonment for debt when the judgment was founded on a tort. That this view is founded upon reasoning that is fallacious and unsound is almost too plain for argument. What is the purpose of an execution against the body of the defendant? What is the end to be accomplished? Manifestly it is the collection of the judgment. Money is that which the plaintiff has been adjudged entitled to, and money is that which the execution calls for. The taking of the defendant's body is merely a means of enforcing the payment of the sum named in the *capias ad satisfaciendum* just as a levy upon personal or real estate is a means of enforcing the payment of the sum named in an ordinary writ of *fieri facias*. If the imprisonment of the defendant was because of his fraud, or of a tort, such imprisonment would properly constitute a part of the judgment itself, and he could not escape it by the

payment of the money thereby called for. If the defendant in an action for a tort, pays the judgment before execution issues, no imprisonment can follow no matter what may be the nature of the fraud or the tort. To say that imprisonment is for fraud when the judgment is solely for money, and may be satisfied by money is not consistent with sound reason. The judgment is for damages for the fraud, and the imprisonment is for non-payment in money of the damages awarded.

That the term "imprisonment for debt," when properly construed, includes imprisonment for non-payment of any judgment, whether such judgment be founded on contract or on tort, is evidenced not only by the way in which it was used by Congress in its legislation prior to 1839, above referred, but also by its meaning as used in the statutes passed by the British parliament. Thus in 1869 a statute was enacted (32 and 33 Victoria, Ch. 62), the title of which was "An act for the abolition of im-" prisonment for debt," and the provisions of which, so far as they shed any light upon the sense in which the term "imprisonment for debt" was used, were as follows :

"PART I.

"ABOLITION OF IMPRISONMENT FOR DEBT.

"4. With the exceptions hereinafter mentioned, no "person shall, after the commencement of this act, be "arrested or imprisoned for making default in payment "of a sum of money.

"There shall be excepted from the operation of the "above enactment.

"1. Default in payment of a penalty, or sum in the "nature of a penalty, other than a penalty in respect of "any contract.

"2. Default in payment of any sum recoverable sum-"marily before a justice or justices of the peace.

"3. Default by a trustee or person acting in a fiduci-"ary capacity and ordered to pay by a court of equity "any sum in his possession or under his control.

"4. Default by an attorney or soliciter in payment "of costs, when ordered to pay costs for misconduct as "such, or in payment of a sum of money when ordered "to pay the same in his character of an officer of the "court making the order.

"5. Default in payment for the benefit of creditors "of any portion of a salary or other income in respect of "the payment of which any court having jurisdiction in "bankruptcy is authorized to make an order.

"6. Default in payment of sums in respect of the "payment of which orders are in this act authorized to "be made:

"Provided, first, that no person shall be imprisoned

" in any case excepted from the operation of this section " for a longer period than one year; and secondly, that " nothing in this section shall alter the effect of any " judgment or order of any court for payment of money " except as regards the arrest and imprisonment of the " person making default in paying such money.

" 5. Subject to the provisions hereinafter mentioned, " and to the prescribed rules, any court may commit to " prison for a term not exceeding six weeks, or until pay- " ment of the sum due, any person who makes default " in payment of any debt or instalment of any debt due " from him in pursuance of any order or judgment of " that or any other competent court."

This language is so plain that no doubt can exist that it was intended to and did include all judgments, orders and decrees for the payment of money, and that a default in the payment of a judgment in tort was not placed upon any other footing than a default in the payment of any other judgment excepting so far as otherwise expressly provided by the act. The act, by its terms, covered every species of judgment, order or decree in a civil suit, and is therefore an interpretation by parliament of the term "imprisonment for debt" as including every case of imprisonment for non-payment of a judgment, order or decree in a civil action.

Having thus discussed the meaning of the terms "im- " prisoned for debt" and "imprisonment for debt" as used in Section 990, in the light of statutes passed prior to 1839, let us now consider it in the light of the provisions of Section 991, and of the acts of 1839, 1841 and 1867.

What was the purpose of Section 991? The most

reasonable conclusion, it seems to us, is that its purpose was merely to prescribe the *method* by which judgment debtors might avail themselves of the "modifications, "conditions and restrictions upon imprisonment for "debt," provided by the laws of the several states and secured to them by the preceding section. It does not say that the person arrested or imprisoned shall be entitled to discharge *for the same causes* that would entitle him to discharge by a state court; but it says he shall be discharged *in the same manner*. In other words, it seems to us Section 990 was intended to define the rights of judgment debtors to exemption or release from imprisonment under executions, and Section 991 was intended to prescribe the method by which the right to release might be availed of. If this be the purpose to be attributed to Section 991 and it be construed accordingly, we shall find respecting the use of the terms "imprisonment for "debt" and "execution in any civil action" a condition of things very similar to that which existed in the statutes in force prior to 1839. The only substantial difference in this respect, between the earlier and the later legislation, is that in the earlier statutes the term "imprisoned for debt" was used in the title of each of the acts, and the words "civil actions" or "in any "civil action" were found in the body of the act, and thereby the intention of Congress was declared that imprisonment for debt should mean imprisonment in any civil action, while in the provisions of the Revised Statutes the terms "imprisoned for debt" and "impris- "onment for debt" are used in the section which declares the rights of judgment debtors and the term "in "any civil action" is used in the section which provides the manner in which those rights may be availed of.

In considering this question the history of Sections 990 and 991 is highly important. These sections are a revision of three previous acts of Congress without any substantial change in their meaning.

The first of these acts was that approved February 28, 1839, and entitled "An Act to abolish imprisonment for "debt in certain cases" (5 Statutes at Large, 320, see Appendix, *post*), by which it was provided that no person should be imprisoned for debt in any state on process issuing out of a court of the United States where by the laws of the state imprisonment for debt had been abolished, and that where by the laws of a state imprisonment for debt was allowed under certain conditions and restrictions, the same conditions and restrictions should be applicable to the process issuing out of the courts of the United States and that the same proceedings should be had therein as were adopted in the courts of such state.

The second was that approved January 14, 1841, and entitled "An Act supplementary to 'An act to abolish im- "prisonment for debt in certain cases," (5 Statutes at Large, 410, see Appendix, *post*), by which the prior act was construed to abolish imprisonment for debt on process issuing out of any court of the United States in all cases whatever, where by the laws of the state in which the said court should be held imprisonment for debt had been or *should thereafter be abolished.*

The third act was that approved March 2, 1867, and entitled "An Act supplementary to the several acts of "Congress abolishing imprisonment for debt" (14 Stat. at Large, 543, see Appendix, *post*), by which it is provided that any defendant arrested or imprisoned upon mesne process or execution issuing out of any of the courts

of the United States should be entitled to discharge from such arrest or imprisonment in the same manner as if he were so arrested or imprisoned on like process of the state courts in the same district, and that all modifications, conditions and restrictions upon imprisonment for debt then existing by the laws of any state should be applicable to process issuing out of the courts of the United States therein and the same course of proceedings should be adopted as then were or might be in the courts of such state.

The purpose of this last act was to do away with the difference in the proceedings under executions against the body in the state courts and those in the United States courts, which resulted from the strict construction placed by the courts of the United States upon the first two acts, and to render the meaning and intention of Congress so plain that it could not be misunderstood.

Low v. *Durfee*, 5 Fed. Rep., 256;
Catherwood v. *Gapete*, 2 Curt. C. C., 94;
United States v. *Tetlow*, 2 Lowell, 159;
In re Freeman, 2 Curt., C. C.

There is nothing in its language to indicate that its provisions were intended to apply to cases that would not be included in those described by Congress in the acts of 1839 and 1841, as cases of "imprisonment for debt." Indeed the title of the act of 1867 being "An act supplementary to the several acts of Congress abolishing *imprisonment for debt*," the presumption is that all cases covered by its provisions were included in what Congress understood by cases of "imprisonment for debt." But the act declares that "whenever upon mesne process or "execution issuing out of any of the courts of the United

"States, *any* defendant therein is arrested or imprisoned, "he shall be entitled to discharge," etc., and hence like the acts of 1796 and 1800, it was applicable to all cases of imprisonment on process in civil actions, whether founded on contract or on tort. Hence we see that Congress, as late as 1867 again furnishes evidence that it uses the term "imprisonment for debt" in the sense of "im- "prisonment on process in civil actions," and not in its strict sense of "imprisonment for debt arising out of con- "tract."

This was the view entertained by Mr. Justice McLean, for, in *Cooper* v. *Dungler*, 4 McLean, 257, he expressed his opinion as to the effect of the acts of 1839 and 1841 in the following language:

"Since the Act of Congress abolishing imprisonment "for debt to the extent that the same has been abol- "ished by the respective states, no process to arrest a "defendant *in a civil case* can be issued except under "the state law."

When, therefore, the term "imprisonment for debt," as used in section 990, is construed in the light of section 991, and of the acts of 1839, 1841 and 1867, the conclusion is, it seems to us, irresistible that Congress intended to use it in the sense of "imprisonment on pro- "cess in civil actions."

The second question to be considered is, whether section 991, does not, when considered by itself alone, make imprisonment under executions issued from courts of the United States in all civil actions, whether founded on contract or on tort, dependent entirely upon the laws of the several states and require that no defendant shall be imprisoned under process issued from a court of the United States in

any civil action when the conditions and circumstances are such as would forbid such imprisonment were the action one pending in or determined by the state court.

It seems to us no doubt can be left respecting this question, when we consider and give proper weight to the language used by Congress, for it declares that the defendant "shall be entitled to discharge from such arrest "or imprisonment *in the same manner as if he was so ar-* "*rested and imprisoned on like process from the courts of* "*such state.*"

This declaration is so broad, comprehensive and plain as to leave no room for doubt as to the right of a defendant to be discharged from arrest under final process in any case where, under the same circumstances, he would be discharged if arrested on final process issued upon a judgment rendered by a state court. If it be suggested that the subsequent provision contained in the section that the proceedings for such discharge shall be had before one of the commissioners of the Circuit Court, and that the same course of proceeding shall be adopted as may be adopted in the courts of the state, show that the section was only intended to apply to the case of a defendant lawfully arrested under a *capias ad satisfaciendum* properly issued, and where the discharge was sought because of the defendant's insolvency, and that it does not apply to the case of an arrest under process unlawfully or improperly issued, it is a sufficient answer to say that the intention ought not to be imputed to Congress to permit state laws to regulate the discharge of a defendant from arrest under a *capias ad satisfaciendum* lawfully issued, and at the same time give no force or effect to the laws of the state prohibiting the issuance of the writ in the first instance or the arrest and imprisonment

of the defendant thereunder. To permit state laws to regulate a judgment debtor's detention after his arrest, but to refuse them force as regulating his arrest in the first instance, would seem so contrary to common sense that nothing but absolute necessity should justify imputing such an intention to the legislative department of the government.

The broad and comprehensive declaration of the right of a defendant to be discharged from imprisonment in the same manner as if he had been arrested under like process from a State court, is not necessarily limited by the subsequent provision that the proceedings for such release shall be had before a commissioner of the Circuit Court. A valid declaration of a defendant's rights should not be held nullified because coupled with an insufficient provision for their enforcement. It is very clear that a proceeding before a commissioner of the Circuit Court cannot be resorted to for the purpose of determining the question whether a writ of *capias ad satisfaciendum* under which a defendant has been arrested was lawfully issued. The remedy of the defendant in such a case is either a motion to quash the writ or an application for a writ of *habeas corpus*, and such is the remedy that should be applied by the courts, regardless of the provision for proceeding before the commissioner, which, though in terms including all applications for release, is evidently intended to include only those applications made in cases in which the writ has in the first instance been properly isssued.

The third question to be considered is whether sections 990 and 991, if regarded as applicable to all cases of imprisonment under executions in civil actions, require effect to be given to the Illinois statute of 1893, respecting the execution by the defendant of a formal waiver in writing of a trial by jury.

That this question must be answered in the affirmative does not admit of doubt. The terms of section 990 are such as to leave in the courts of the United States no discretion whatever as to whether they will or will not observe and give effect to provisions of state laws in reference to imprisonment in such cases. *All* modifications, conditions and restrictions provided by the laws of the state are made absolutely binding upon the courts of the United States. A provision that a trial by jury or the execution by the defendant of a formal waiver in writing of such mode of trial shall be a condition precedent to his imprisonment under an execution that may be issued for the enforcement of the judgment, if one is rendered, is a "condition" or "restriction" provided by the laws of the state, and is therefore binding upon the courts of the United States.

It follows that, if we are right in the views thus sought to be maintained, sections 990 and 991 of the Revised Statutes, regardless of provisions contained in other sections, entitle appellant to discharge from his imprisonment.

II.

SECTION 914, WHEN CONSIDERED BY ITSELF ALONE, WOULD ALSO ENTITLE APPELLANT TO DISCHARGE FROM HIS IMPRISONMENT.

The language of section 914 of the Revised Statutes is as follows:

"914. The practice, pleadings and forms and modes "of proceding in civil causes other than equity and ad- "miralty causes, in the Circuit and District courts, shall "conform, as near as may be, to the practice, pleadings

"and forms and modes of proceeding existing at the "time in like causes in the courts of record of the state "within which such Circuit or District courts are held, "any rule of court to the contrary notwithstanding."

In *Wayman* v. *Southard*, 10 Wheat., 1, Chief Justice MARSHALL, in speaking of the term, "forms and modes "of proceeding," in suits as used in section 2 of the act of May 8, 1792 (Stat. at Large 276, *post*), and which is the same expression used in section 914 above quoted, said that it "embraces the whole progress of "the suit and every transaction in it, from its commence- "ment to its termination, which has been already shown "not to take place *until the judgment shall be satisfied.* "It may, then, and ought to be understood as prescrib- "ing the conduct of the officer in the execution of pro- "cess, *that being a part of the proceedings in the suit.*"

In *Lamaster* v. *Keeler*, 123 U. S., 376, in commenting upon this section, Mr. Justice FIELD, in delivering the opinion of the court, among other things, says:

"The general language of the section, in the absence "of qualifying provisions, would comprehend all pro- "ceedings in a cause, from its commencement to its con- "clusion, *embracing enforcement of the judgment therein.* "The court which has jurisdiction of a cause has juris- "diction over the various proceedings which may be "taken therein, from its initiation to the satisfaction of "the judgment rendered. Any practice, pleading, form "or mode of proceeding which may be applicable in any "stage of a cause in a state court would, therefore, un- "der the section in question, in the absence of other "clauses, be also applicable in a like stage of a similar "cause in a Federal court. *The section would embrace*

" *proceedings after judgment equally with those preced-*
" *ing its rendition.*"

In *Low* v. *Durfee*, 5 Fed. Rep., 256, LOWELL, C. J., in delivering his opinion in a case concerning an execution against the body, among other things, says:

" The Revised Statutes have adopted the forms and
" modes of proceeding of the several states, not as they
" were in 1828, but as they were in 1874, and shall be
" from time to time. (Rev. Stat., § 914.) We are
" bound, therefore, to issue such an execution as the
" courts of the state would issue in like circumstances;
" and that is (*i. e.* in the case then under consideration),
" an execution against the property, but not against the
" body of the defendant."

The case last cited, it will be observed, is not only one in support of the proposition that section 914, when considered by itself alone, prohibits a court of the United States from issuing an execution against the body when, under like circumstances, no such execution could be issued by the courts of the state, but it is also authority in favor of the proposition that the section is not so modified by other provisions of the Revised Statutes as to permit the courts of the United States to issue executions against the body when, under like circumstances, no such execution could be issued by the courts of the state.

But it is said that the requirement of the Illinois statute of 1893, that the defendant shall not be imprisoned for non-payment of a judgment in a civil action, rendered upon a finding by the court unless he shall have executed a formal waiver in writing of a trial by jury, is one that may be dispensed with by the courts of the United States by virtue of the provision that their conformity to the

forms and modes of proceeding in the state courts shall be "as near as may be." This position, however, would be clearly untenable if section 914 were to be considered by itself alone and as embodying all the law upon the question.

To require that a defendant must execute a waiver in writing of a trial by jury to authorize his imprisonment in satisfaction of a judgment rendered upon a trial by the court without a jury, is not at all impracticable or inconsistent with the exercise by a court of the United States of its powers in conformity with the constitution and laws of the United States. In this respect it differs from a requirement that the court shall instruct the jury in writing, which was held not applicable to courts of the United States in *Nudd* v. *Burrows*, 91 U. S., 425, or from regulations respecting the preparation, perfecting, settling and signing of bills of exceptions, which were held inapplicable in the case of *Chateaugay Ore & Iron Co.*, 128 U. S., 544.

That the legislature of a state has passed a law regulating the conduct of the judge upon the bench, and the judicial department of the state has seen fit to acquiesce in such law, is no reason why the courts of the United States should give effect to such an act of palpable encroachment by the legislative department upon the judicial as that accomplished by a requirement that the judge instruct the jury in writing, and, as the seventh amendment to the Constitution of the United States declares that "no fact tried by a jury shall be otherwise re-examined in any court of the United State than according to the rules of the common law," and the laws of the various states permit facts tried by jury to be re-examined upon appeal in a manner different from that

provided by the common law, it is apparent that regulations prescribed by the laws of the several states respecting bills of exception should not properly be held applicable to and binding upon the courts of the United States.

With respect to the statute now under consideration, however, the case is different. A regulation like the one in question, provided by a state law for the protection of the liberty of a litigant, can be complied with by a court of the United States sitting within such state, without any impairment to its dignity, or without causing any embarrassment or hindrance to the proper administration of justice. Such regulation neither affects the personal conduct of the judge nor interferes with the exercise by the court of its powers as defined and limited by the constitution and laws.

We submit, therefore, that such requirement, being a mode of proceeding which can be readily complied with, is binding upon the courts of the United States, and that Section 914, when considered by itself alone, would entitle appellant to a discharge from his imprisonment.

III.

SECTION 914 IS NOT LIMITED BY SECTION 716.

Section 716 of the Revised Statutes is as follows:

"716. The Supreme court and the Circuit and Dis-
" trict courts shall have power to issue writs of *scire*
" *facias*. They shall also have power to issue all writs
" not specifically provided for by statute, which may be
" necessary for the exercise of their respective jurisdic-
" tions and agreeable to the usages and principles of
" law."

It is undoubtedly true that the provisions of this section when first enacted and embodied in section 14 of the Judiciary act of 1789 (See Appendix, *post*) could properly have been construed as authorizing the courts of the United States to issue writs of *capias ad satisfaciendum*, for at that time the issuance of such writs for the enforcement of all judgments at law for the recovery of money was "agreeable to the principles and usages of law." It by no means follows, however, that the same provisions, when embodied in the revised statutes, are to be construed as authorizing the issuance of such writs as were agreeable to the principles and usages of law as it existed in 1789. On the contrary, it is clear, that by the term "the principles and usages of law," as used in the law now in force, is to be understood the principles and usages of law as it *now* exists, and not as it existed a century ago.

If, therefore, Section 914, when taken by itself alone, authorizes and requires the courts of the United States to issue only such writs of execution as the laws of the several states authorize and direct the courts of those states to issue under like circumstances, its effect is in no manner limited or controlled by Section 716, but on the contrary, it operates as a limitation upon Section 716 by requiring the words, "the principles and usages of law," as used in that section, so far as they relate to writs of execution, to be construed as would be the words, "the "principles and usages of law existing from time to time "in the several states."

IV.

SECTION 914 IS NOT LIMITED BY SECTION 916.

Section 916 of the Revised Statutes is as follows:

"916. The party recovering a judgment in any common law cause in any Circuit or District court, shall "be entitled to similar remedies upon the same, by execution or otherwise, to reach the *property* of the judgment debtor, as are now provided in like causes by "the laws of the State in which such court is held, or by "any such laws hereafter enacted which may be adopted "by general rules of such Circuit or District court; and "such courts may from time to time by general rules "adopt such State laws as may hereafter be in force in "such State in relation to remedies upon judgments as "aforesaid by execution or otherwise."

In *Lamaster* v. *Keeler*, 123 U. S., 376, Mr. Justice FIELD, in delivering the opinion of the court, says, in commenting upon the effect of section 916, that "to en-"force judgments in common law causes only such rem-"edies can be pursued 'as are now provided in like "'causes by the laws of the State—that is, when the "act of Congress on the subject, the above section, (i. e. "Sec. 916), was passed or re-enacted—or, if provided "by subsequent laws of the State, such as have been "adopted by the Federal courts."

This language of Mr. Justice Field leads the court in the opinion of the case at bar to say, that Section 916 has "been declared to be inapplicable to remedies upon "judgments."

In this, however, the court is in error. The language

thus used by Mr. Justice Field must be considered in the light of the fact that the execution in the case then under consideration was one which was sought to be used "to "reach the property of the judgment debtor. "The provisions of the section referred to, as will be observed, are expressly limited to remedies "to reach the *property* of the "judgment debtor," and this renders it inapplicable to an execution against the *body* of the debtor. Had Congress intended that the section should be applicable to executions against the body of the debtor, it would either have omitted the words "to reach the property of the "judgment debtor," or would have used in lieu thereof the words, "to reach the property *or body* of the judg- "ment debtor."

As, therefore, Section 916 does not relate to or provide for executions against the *body* of the debtor, it follows that, so far as executions of that kind are concerned, it can have no effect as a limitation upon Section 914.

V.

SECTION 914 IS NOT LIMITED BY SECTION 649.

In reply to our suggestion that Section 649 was framed for the sole purpose of enabling the parties to obtain by writ of error or appeal a review of the rulings of the court in cases where a trial by jury had been waived, it is said by the court that the clause "shall have the "same effect as the verdict of a jury" cannot have reference only to the right of appeal, since that right is given and limited by another section, namely: Section 700 of the Revised Statutes, and that there is nothing to the contrary in *Kearney* v. *Case*, 12 Wall., 275, or in *Gilman* v. *Ill. & Miss. Tel. Co.*, 91 U. S., 603. This

conclusion, however, is wholly inconsistent with the history of Sections 649 and 700, and with the settled rules of interpretation by which the meaning of those sections is to be determined.

The fact that the provision in reference to exceptions and a review upon appeal or writ of error is contained in a section separate from 649 is of no importance. The matter contained in both sections was embodied in a single section of the act of March 3, 1865, and the rule is well settled that sections of a statute re-enacted in the Revised Statutes should be given the same meaning they had in the original, unless the contrary intention is plainly manifested.

United States v. *Le Bois*, 121 U. S., 278.
United States v. *Bowen*, 100 U. S., 508.
Meyer v. *Western Car Co.*, 102 U. S., 1.
Victor v. *Arthur*, 104 U. S., 498.
United States v. *Lacher*, 134 U. S., 624.

The question then recurs, what was the intention of Congress in passing the act of March 3, 1865 (13 Stat. at Large, 502), entitled "An act regulating proceedings in "criminal cases and for other purposes," the fourth section of which contained the provisions embodied in Sections 649 and 700 of the Revised Statutes?

It is a settled rule of interpretation that in ascertaining the meaning of a statute the legislative purpose, and the object aimed at are to be borne in mind. The meaning of the words used is to be found not so much in the strict etymological propriety of the language, nor even in its popular use, as in the subject or occasion on which they are used.

Rix v. *Hall*, 1 B. & C., 136.
Brewer v. *Blougher*, 14 Pet., 198.

It is important then to inquire what was the condition of the law respecting trials by the court without a jury in common law cases prior to the act of March 3, 1865, and what change in the then existing law it was necessary for Congress to make, in order to remedy the defect in the law which led to the passage of that act. This inquiry is fully answered by the decisions of the Supreme court.

In *Campbell* v. *Boyreau*, 21 Howard, 223, which is the leading case upon the subject of the effect of the submission of a common law case to the court for trial without a jury, in the absence of a statute authorizing such method of procedure, Chief Justice TANEY, in delivering the opinion of the court, among other things, says:

"By the established and familiar rules and principles "which govern common law proceedings, no question of "law can be reviewed and re-examined in an Appellate "court upon writ of error (except only where it arises "upon the process, pleadings, or judgment, in the cause), "unless the facts are found by a jury, by a general or "special verdict, or are admitted by the parties, upon a "case stated in the nature of a special verdict stating "the facts, and referring the questions of law to the "court.

"The finding of issues in fact by the court upon the "evidence is altogether unknown to a common law "court, and cannot be recognized as a judicial act. "Such questions are exclusively within the province of "the jury; and if, by agreement of parties, the ques "tions of fact in dispute are submitted for decision to "the judge upon the evidence, he does not exercise judi- "cial authority in deciding, but acts rather in the char-

"acter of an arbitrator. And this court, therefore, cannot regard the facts so found as judicially determined in the court below, nor examine the questions of law, as if those facts had been conclusively determined by a jury or settled by the admission of the parties. Nor can any exception be taken to an opinion of the court upon the admission or rejection of testimony, or upon any other question of law which may grow out of the evidence, unless a jury was actually impaneled, and the exception reserved while they were still at the bar. The statute which gives the exception in a trial at common law gives it only in such cases. And as this court cannot regard the facts found by the judge as having been judicially determined in the court below, there are no facts before us upon which questions of law may legally and judicially have arisen in the inferior court, and no questions, therefore, open to our revision as an Appellate tribunal. Consequently, as the Circuit court had jurisdiction of the subject-matter and the parties, and there is no question of law or fact open to our re-examination, its judgment must be presumed to be right, and on that ground only affirmed."

In other cases decided by the Supreme court prior to 1865 it had been likewise held that when, by the agreement of the parties, a trial by jury had been waived, neither the finding of the court nor any other ruling upon the trial could be reviewed on error or appeal.

Guild v. *Frontin*, 18 How., 135.
Suydam v. *Williamson*, 20 How., 432.
Kilsey v. *Forsythe*, 21 How., 85.
Flanders v. *Tweed*, 9 Wall., 425.

It thus appears that prior to the enactment of the provisions now embodied in Sections 649 and 700, the finding of the court, in a case where the parties had waived a trial by jury, differed in its *effect* from the verdict of a jury in the following particulars:

1. It was not a judicial determination.

2. It precluded the examination in an appellate tribunal of any ruling of the judge upon the trial, and limited the review by such appellate tribunal to such questions only as might arise upon the process, pleadings or judgment.

In all other respects it had the same force and effect as the verdict of a jury, and a judgment entered thereon had the same force and effect as one entered upon the verdict of a jury. It is manifest, therefore, that the purpose of the Act of March 3, 1865, and its only purpose, was to give sanction to the practice of submitting common law cases to trial by the court without the intervention of a jury, and to enable the parties, when cases should be so submitted, to secure the same right to a review upon appeal or writ of error that could be had in cases tried by jury.

Such, then, having been the occasion and the purpose of the Act of March 3, 1865, upon what principle or rule of statutory interpretation or construction can it be permitted to nullify, so far as the courts of the United States are concerned, a state statute, the enactment of which could not have been contemplated by Congress, and which in nowise interferes with giving to the Act of Congress all the force necessary to accomplish the purpose which Congress had in view at the time of its passage?

If, by giving effect to the Illinois statute, any impediment could be interposed to giving to the finding of the court the same effect as the verdict of a jury for the purpose of enabling the parties to obtain a review in an Appellate court by writ of error or appeal of the rulings of the court at the trial, it might well be said to be so inconsistent with the Act of Congress that the courts of the United States could not give it effect.

Thus, had the legislature of Illinois enacted a statute forbidding issues of fact in any action at law to be tried in any other manner than by a jury, it would very properly be held that such enactment was inconsistent with the laws of the United States upon the same subject, and that notwithstanding such state law the courts of the United States would be authorized and required to try issues of fact in actions at law "whenever the parties or "their attorneys of record file with the clerk a stipula- "tion in writing waiving a jury;" but the statute now under consideration does not forbid the mode of trial authorized by Section 649, and a trial in accordance with the provisions of that section is in no manner inconsistent with the Illinois statute.

Again, the statute of Illinois is not legislation for the purpose of regulating the waiver of jury trials and the trial of issues of fact by the court. In other words, it does not purport to prescribe the manner in which the court may be authorized to try issues of fact in place of a jury. On the contrary, it is legislation upon the subject of imprisonment for the enforcement of judgments for the payment of money in civil actions. The proceedings which it regulates are the proceedings under executions, and not the proceedings respecting the trial of causes by the court or the jury. It relates, therefore, to a subject

concerning which Congress has not itself legislated in any other way than by a general provision requiring conformity to state laws, in matters of "practice, pleadings "; and forms and modes of proceeding," and a special provision, applicable, as we contend, to the case at bar, that "all modifications, conditions and restrictions upon "imprisonment for debt provided by the laws of any "state shall be applicable to the process issuing from the "courts of the United States to be executed therein."

For these reasons we insist that the Illinois statute of 1893 cannot be nullified by Section 649, which was enacted for an entirely different purpose, and which can be given the full force Congress intended it should have without interfering with full force and effect being given to the state law.

VI.

THE PROVISIONS OF THE REVISED STATUTES, WHEN CONSIDERED IN THE LIGHT OF THEIR HISTORY, SHOW THAT CONGRESS INTENDED TO REQUIRE STRICT CONFORMITY BY THE COURTS OF THE UNITED STATES WITH STATE LEGISLATION, REGULATING IMPRISONMENT BOTH UNDER JUDGMENTS FOUNDED ON CONTRACT AND UNDER THOSE FOUNDED ON TORT.

Originally, at common law, no defendant could be arrested on mesne or final process in a civil action other than trespass *vi et armis* or one brought in the name of the sovereign. Statutes authorizing arrests in other cases grew out of the difficulty experienced in compelling defendants to appear in reponse to writs of summons issued against them.

"To partially remove this difficulty a statute was en- "acted in the year 1267 authorizing writs of *capias ad*

"*respondendum* to issue against bailiffs, whereby the "sheriff was empowered to arrest such bailiffs in actions "against them for an accounting. In the year 1285 the "same writs were authorized to issue against receivers to "compel them to account. In 1350 the same remedy "was allowed to plaintiffs in actions of debt and de-"tinue; and in the year 1503 it was extended to actions "on the case.

"The statutes to which we have referred were enacted "with the view of securing the appearance of defend-"ants. But the courts, without any statutory authority, "always assumed that in every action in which a *capias* "*ad respondendum* could issue the plaintiff was, after "judgment, entitled to execution against the body of the "defendant. The writ which issued after judgment to "authorize the taking and detention of the defendant "was styled a *capias ad satisfaciendum*."

Freeman on Executions, Sec. 451.

It will thus be seen that, excepting in the single case of the action of trespass *vi et armis*, the common law and the early statutes in modification thereof did not discriminate in favor of executions against the body in actions *ex delicto*, but, on the contrary, the discrimination was the other way, for, while such writs were allowed in 1267 against bailiffs in actions for accounting, in 1285 in actions against receivers to compel them to account, in 1350 in actions of debt and detinue, it was not until 1503 that they were allowed in actions on the case. From that time until the organization of the government of the United States all judgment debtors, so far as imprisonment under executions was concerned, were upon the same footing. Whatever might be the cause of action, the judgment, when rendered, if it required the payment

of a sum of money, became a debt, and imprisonment, as a means of obtaining satisfaction thereof, was commonly known and described as "imprisonment for debt."

This was the condition of the law on September 28, 1789, when Congress passed the act entitled "An Act to "regulate process in the courts of the United States." (1 Statutes at Large, 93.) The second section of this act (see Appendix, *post*) declared that "the forms of writs "and executions, except their style, and modes of pro- "cess and rates of fees, except fees to judges in the Cir- "cuit and District courts, in suits at common law, shall "be the same in each state, respectively, as are now "used or allowed in the Supreme courts of the same."

This was followed by the act of May 8, 1792 (1 Statutes at Large, 276), entitled "An act for regulating the "processes in the courts of the United States, and pro- "viding compensation for the officers of the said courts "and for jurors and witnesses." The second section of this act (see Appendix, *post*) provided that "the forms "and modes of proceeding in suits of those of common "law shall be the same as are now used in the said "courts respectively in pursuance of the act entitled 'An "act to regulate processes in the courts of the United "States' * * * subject, however, to such altera- "tions and additions as the said courts respectively shall, "in their discretion, deem expedient, or to such regula- "tions as the Supreme court of the United States shall "think proper from time to time by rule to prescribe "to any Circuit or District court concerning the same."

In *Wayman* v. *Southard*, 10 Wheat., 1, it was held that these acts required conformity on the part of the courts of the United States with the laws of the several states in force on September 28, 1789, including laws

regulating the issuance of and the proceedings under writs of execution against the body, reserving, however, to the courts of the United States to make such alterations with respect thereto as they might, in their discretion, deem expedient. It follows that in the absence of such alterations the rights of judgment debtors imprisoned under process issuing from the courts of the United States were precisely like those of judgment debtors imprisoned on September 28, 1789, under process issued from the courts of the several states. While conformity with state laws upon the subject of such imprisonment was required, it was not conformity with state laws that might be passed from time to time, but with those in force on the date mentioned, and was subject to the exercise by the courts of the United States of the power given them with respect to alterations of and additions to the provisions of such state legislation.

This policy of conformity on the part of the courts of the United States with the laws of the several states in force September 28, 1789, so far as those laws related to imprisonment under process in civil actions, was modified by the acts of May 5, 1792, May 30, 1794, May 28, 1796, June 6, 1798, and January 6, 1800, hereinbefore referred to, all of which purported to be acts "for the relief of persons im-" prisoned for *debt*." The effect of these acts, as we have already seen, was to entitle any person imprisoned under an execution issued out of any court of the United States in *any civil action* to a discharge from his imprisonment upon his taking the poor debtor's oath after proving his pecuniary circumstances were such as to entitle him so to do. It followed that no matter what were the laws of a particular state on September 28, 1789, or

from time to time thereafter, or whether they did or did not allow a judgment debtor imprisoned under execution issued from the State court, to obtain a discharge from his imprisonment, a judgment debtor imprisoned under process issued out of a court of the United States sitting in such state was entitled to be discharged only upon compliance with the provisions contained in the acts of Congress passed for the relief of persons imprisoned for debt. Thus, it is to be observed, conformity with state legislation upon this subject was suspended and in its place there was substituted provisions uniform in their operation in all the courts of the United States.

This policy of uniformity in the proceedings of the various courts of the United States in respect to proceedings under executions against the body in civil cases was continued until May 19, 1828, when Congress passed the act entitled "An Act further to regulate processes in the "courts of the United States." (4 Statutes at Large, 278, see Appendix, *post*.)

The first section of this act prescribed that the forms of mesne process, except the style, and the forms and modes of proceeding in suits in the courts of the United States, held in those states admitted into the Union since the 29th day of September, in the year 1789, in those of common law, should be the same in each of said states respectively as were then used in the highest court of original and general jurisdiction of the same, subject, however, to such alterations and additions as the said courts of the United States respectively should in their discretion deem expedient, or to such regulations as the Supreme court of the United States should think proper from time to time, by rules, to prescribe to any Circuit or District court concerning the same.

The third section of the act provided in substance that writs of execution and other final process issued on judgments and decrees rendered in any of the courts of the United States, and the proceedings thereupon, should be the same, except their style, in each state respectively, as were then used in the courts of such state, subject, however, to the power of the courts of the United States in their discretion, by rules of court, to so far alter final process as to conform the same to subsequent changes made by state legislation.

This act was in *Beers* v. *Houghton*, 9 Peters, 362, and in *United States* v. *Knight*, 14 Peters, 316, held to necessitate conformity on the part of the courts of the United States with all state laws "which regulate the rights, "duties and conduct of officers in the service of such "process, according to the exigency upon the person or "property of the execution debtor, and also all the ex-"emptions from arrest or imprisonment under each pro-"cess created by those laws." It follows, therefore, that this act was an abandonment by Congress of its policy of uniformity in the proceedings of the courts of the United States respecting proceedings under executions against the body in civil cases, and a return to the policy of conformity on the part of such courts with the laws of the several states regulating such proceedings in the courts of the states, and the conformity required was not simply conformity in cases of imprisonment for debt arising out of contract, but conformity in all cases of imprisonment under process in civil actions. But Congress still pursued the conservative course of leaving the adoption of future state legislation to the discretion of the courts, a discretion which, so far as we have been able to discover, was never exercised by any court of the United

States, from the organization of the government down to the time of the revision of the statutes in 1874 by the adoption of any subsequent state legislation mitigating the severity of the law regulating imprisonment under executions in civil cases.

The failure of the courts of the United States to exercise this discretion of adopting future state legislation led to the passage of the acts of February 26, 1839, January 14, 1841 and March 2, 1867, which, as we have seen, are now embodied in and constitute Sections 990 and 991 of the Revised Statutes. When the act of March 2, 1867, was adopted, the laws governing the proceedings of the courts of the United States in common law causes, were therefore as follows:

1. The proceedings from the commencement of the suit down to and including the entry of judgment were, in the states admitted into the Union prior to the 29th day of September, 1789, required to conform to the laws of such several states in force on September 28, 1789, subject, however, to such alterations and additions as the said courts, respectively, should, in their discretion, deem expedient, or to such regulations as the Supreme court of the United States should think proper from time to time to prescribe to any Circuit or District court concerning the same.

2. The proceedings from the commencement of the suit down to and including the entry of judgment were, in the states admitted into the Union after the 29th day of September, 1789, required to conform to the laws of such several states in force on May 19, 1828, subject, however, to such alterations and additions as the said courts, respectively, should, in their discretion, deem expedient, or to such regulations as the Supreme court of

the United States should think proper from time to time to prescribe to any Circuit or District court concerning the same.

3. The proceedings after the entry of judgment in all the courts of the United States, excepting such proceedings as related to what was understood by Congress as "imprisonment for debt," were required to conform to the laws of the several states in force on May 19, 1828, subject, however, to such changes in final process as the courts of the United States might by rule prescribe for the purpose of making such final process conform to any change which might thereafter be adopted by the legislatures of the several states for the state courts.

4. All proceedings having relation to what was understood by Congress to be included within the term "imprisonment for debt" were required to be in strict conformity with the laws of the several states excepting that the proceedings for the discharge of persons arrested or imprisoned under *mesne* or final process were required to be had before a commissioner of the Circuit court of the United States.

Such was the condition of the law governing the practice, pleadings and forms and modes of proceeding in common-law cases in the courts of the United States, when on June 1, 1872, Congress passed the act entitled "An Act to further the administration of justice" (17 Statutes at Large, 197. See Appendix *post.*)

The fifth section of this act, with the exception of the proviso relating to rules of evidence, is precisely the same in effect as, though slightly different in phraseology from Section 914 of the Revised Statutes, while the sixth section is a combination of the provisions now contained in

Sections 915 and 916 of the Revised Statutes. Although there has been a revision of the statutes since this act of June 1, 1872, such revision, while slightly different in form and language, has made no substantial change in the law, as it then existed, bearing upon the questions now under consideration.

In *Nudd* v. *Burrows*, 91 U. S., 426, the court, through Mr. Justice SWAYNE, in speaking of Section 5 of this act of 1872, say:

"The purpose of the provision is apparent upon its "face. No analysis is necessary to reach it. It was to "bring about uniformity of procedure in the Federal and "State courts of the same locality. It had its origin in "the code enactments of many of the states. While, in "the Federal tribunals the common-law pleadings, "forms and practice were adhered to in the state courts "of the same district, the simpler forms of the local code "prevailed. This involved the necessity on the part of "the bar of studying two distinct systems of remedial "law, and of practicing according to the wholly dis-"similar requirements of both. The inconvenience of "such a state of things is obvious. The evil was a seri-"ous one. It was the aim of the provision in question "to remove it. This was done by bringing about the "conformity in the courts of the United States which it "prescribes."

What, then, is the effect to be given Sections 914, 915, 916, 990 and 991, when considered together, upon the proceedings in the courts of the United States? There can be no dispute as to the following particulars:

1. The proceedings other than attachments against the defendant's property, from the commencement of the

suit down to and including the entry of judgment, are required to conform as nearly as is practicable to the laws of the several states that may be in force from time to time, excepting as is otherwise expressly provided by some law of the United States.

2. The proceedings for an attachment of a defendant's property, and all proceedings after the entry of judgment which relate to the enforcement of the judgment against the property of the judgment debtor, are required to conform to the laws of the several states in force at the time the Revised Statutes were adopted, subject to such subsequent changes in the laws of the states as the courts of the United States may by rule adopt.

3. The proceedings having relation to what was understood by Congress to be included within the term "imprisonment for debt," are required to be in strict conformity with the laws of the several states excepting that the proceedings for the discharge of persons arrested or imprisoned under *mesne* or final process are required to be had before a commissioner of the Circuit court of the United States.

So much being conceded, what is to be said as to that portion of the procedure that relates to imprisonment under executions in actions *ex delicto?* It is clear that one of the three following conclusions must be adopted:

First. That Congress has left the subject of imprisonment under executions in actions *ex delicto* wholly without regulation other than by Section 716, which confers the power "to issue all writs not specifically pro-" vided for by statute, which may be necessary for the " exercise of their respective jurisdictions and agreeable " to the usages and principles of law." This conclusion would result in making proceedings under such execu-

tions conform to the law in force in the eighteenth century, and is, therefore, unreasonable.

Second. That Congress has provided for such executions in Section 914, which requires conformity to state laws "as near as may be." This conclusion, as we have already seen, follows as a necessary consequence, unless the subject was intended to be embraced in Sections 990 and 991. *Wayman* v. *Southard*, 10 Wheat., and *Low* v. *Durfee*, 5 Fed. Rep., 256.

Third. That Congress has provided for such executions in Sections 990 and 991.

It seems to us that this last conclusion is the one to be adopted, if the intention is to be imputed to Congress to be consistent with its previous legislation.

VII.

CONCLUSION.

As to the other questions presented by the record and not decided, we assume that it is not necessary that we discuss them in this argument. As the court has based its dismissal of the appeal in the one case and its affirmance of the judgment in the other solely upon the ground that the statute of Illinois of 1893 is not binding upon a Circuit court of the United States sitting in that state, and as its opinion will form the basis for future rulings of the same character, we may safely assume that the decision of the court with respect to the granting of a rehearing will depend upon its view as to the soundness of its conclusion upon that point, and that a discussion by us of the other questions presented by the record may be safely left for the re-argument of the causes upon their merits in case the rehearing prayed for is allowed.

HIRAM T. GILBERT,

For Appellant and Plaintiffs in Error.

APPENDIX.

The following statutes, with those already set forth in the foregoing argument, constitute the legislation of Congress on the subject of proceedings under executions, so far as the same relates to the questions involved:

Judiciary Act of 1789, 1 Statutes at Large, 81.

"SEC. 14. *And be it further enacted*, That all the before-mentioned courts of the United States shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the Supreme court, as well as judges of the District courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment. *Provided*, That writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by color of authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify."

Approved September 24, 1789.

Chap. XXI. 1 Statutes at Large, 93.

"*An Act to regulate process in the courts of the United States.*"

"SEC. 2. *And be it further enacted*, That until further provision shall be made, and except where by this act or other statutes of the United States is otherwise provided, the form of writs and executions, except their

style, and modes of process and rates of fees, except fees to judges, in the circuit and district courts, in suits at common law, shall be the same in each state respectively as are now used or allowed in the Supreme courts of the same. And the forms and modes of proceedings in cases of equity, and of admiralty and maritime jurisdiction, shall be according to the course of the civil law; and the rates of fees the same as are or were last allowed by the states respectively in the court exercising supreme jurisdiction in such causes. *Provided*, That on judgments in any of the cases aforesaid where different kinds of executions are issuable in succession, a *capias ad satisfaciendum* being one, the plaintiff shall have his election to take out a *capias ad satisfaciendum* in the first instance, and be at liberty to pursue the same until a tender of the debt and costs in gold or silver shall be made."

Approved September 28, 1789.

Chap. XXXVI, 1 Statutes at Large, 276:

"*An act for regulating the processes in the courts of the United States and providing compensation for the officers of the said courts, and for jurors and witnesses.*

"SEC. 2. *And be it further enacted*, That the forms of writs, executions and other processes, except their style, and the forms and modes of proceeding in suits of those of common law shall be the same as are now used in the said courts respectively in pursuance of the act entitled: 'An act to regulate processes in the courts of the United States,' in those of equity and in those of admiralty and maritime jurisdiction, according to the principles, rules and usages which belong to courts of equity and to courts of admiralty respectively,

as contradistinguished from courts of common law; except so far as may have been provided for by the act to establish the judicial courts of the United States, subject, however, to such alterations and additions as the said courts respectively shall, in their discretion, deem expedient, or to such regulations as the Supreme court of the United States shall think proper from time to time, by rule, to prescribe to any circuit or district court concerning the same: *Provided*, that on judgments in any of the cases aforesaid where different kinds of executions are issuable in succession, *a capias ad satisfaciendum* being one, the plaintiff shall have his election to take out a *a capias ad satisfaciendum* in the first instance.

"Approved May 8, 1872."

Chap. XXIX, 1 Statutes at Large, 265.

"*An act for the relief of persons imprisoned for debt.*

"SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That persons imprisoned on executions issuing from any court of the United States for satisfaction of judgments in any civil actions shall be entitled to like privileges of the yards or limits of the respective gaols as persons confined in such gaols for debt on judgments rendered in the courts of the several states are entitled to, and under like regulations and restrictions.

"SEC. 2. And be it further enacted, That any person imprisoned as aforesaid, may have the oath or affirmation, hereinafter expressed, administered to him by any judge of the United States, or of the general or supreme court of law of the state in which the debtor is imprisoned, the creditor, his agent or attorney, if either live

within one hundred miles of the place of imprisonment, or within the district in which the judgment was rendered, having had at least thirty days previous notice, by a citation served on him, issued by any such judge, to appear at the time therein mentioned, at the said gaol, if he see fit, to show cause why the said oath or affirmation should not be so administered; at which time and place, if no sufficient cause, in the opinion of the judge, be shown or doth from examination appear to the contrary, he may, at the request of the debtor, proceed to administer to him the following oath or affirmation, as the case may be, viz: 'You ..... solemnly swear (or affirm) that you have not estate, real or personal, nor is any to your knowledge holden in trust to the amount or value of twenty dollars, nor sufficient to pay the debt for which you are imprisoned." Which oath or affirmation being administered, the judge shall certify the same under his hand, to the prison keeper, and shall fix a reasonable allowance for the debtor's support, not exceeding one dollar per week; and if the creditor shall thereafter any week fail to furnish the debtor with such weekly support, by paying or advancing the money to him, or to the prison keeper, for his use, the debtor shall be discharged from his imprisonment on such judgment, and shall not be liable to be imprisoned again for said debt; but the judgment shall remain good and sufficient in law, and may be satisfied out of any estate which may then or at any time afterwards belong to the debtor.

"SEC. 3. And be it further enacted, That if any person shall falsely take the oath or affirmation aforesaid, such person shall be deemed guilty of perjury, and suffer the pains and penalties in that case provided.

"SEC. 4. And be it further enacted, That this act

shall continue and be in force for the space of one year from the passing thereof, and from thence to the end of the next session of Congress and no longer.

"Approved May 5, 1792."

Chap. XXXIV, 1 Statutes at Large, 270.

"*An Act to continue in force an act for the relief of persons imprisoned for debt.*

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the act, entitled 'An Act for the relief of persons imprisoned for debt,' be continued, and that the same be in force for the term of two years from the the passing of this act, and from thence to the end of the next session of Congress and no longer.

"Approved May 30, 1794."

Chapter XXXVIII, 1 Statutes at Large, 482.

"*An Act for the relief of persons imprisoned for Debt.*

"SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That persons imprisoned on process issuing from any court of the United States in civil actions, shall be entitled to like privileges of the yards or limits of the respective gaols, as persons confined in like cases, on process from the courts of the respective states, are entitled to, and under the like regulations and restrictions.

"SEC. 2. And be it further enacted, That any person imprisoned as aforesaid, may have the oath or affirmation hereinafter expressed, administered to him by any judge of the United States; and in case there shall be no judge

of the United States residing within twenty miles of the gaol wherein such debtor may be confined, such oath or affirmation may be administered by any two persons who may be commissioned for that purpose by the judge of the District court of the United States within whose jurisdiction the debtor may be confined; the creditor, his agent or attorney, if either live within one hundred miles of the place of imprisonment, or within the district in which the judgment was rendered, having had at least thirty days previous notice by a citation served on him, issued by the district judge to appear at the time therein mentioned at the said goal, if he see fit, to show cause why the said oath or affirmation should not be so administered; at which time and place, if no sufficient cause, in the opinion of the judge (or the commissioners appointed as aforesaid) be shown, or doth, from examination, appear to the contrary, he, (or they) may, at the request of the debtor, proceed to administer to him the following oath or affirmation, as the case may be, viz: "You ———, solemnly swear (or affirm) that you have not estate, real or personal, nor is any to your knowledge holden in trust for you, (necessary wearing apparel excepted) to the amount or value of thirty dollars, nor sufficient to pay the debt for which you are imprisoned." Which oath or affirmation being administered, the judge or commissioners shall certify the same under his or their hands to the prison keeper, and the debtor shall be discharged from his imprisonment on such judgment, and shall not be liable to be imprisoned again for the said debt, but the judgment shall remain good and sufficient in law, and may be satisfied out of any estate which may then or at any time afterwards belong to the debtor. And whenever the oath aforesaid shall be ad-

ministered by commissioners, in addition to the certificate by them made and delivered to the prison keeper, they shall make return of their doings to the district court with the commission to them issued, to be kept upon the files and records of the same court.

"SEC. 3. And be it further enacted, That if any person shall falsely take the oath or affirmation aforesaid, such person shall be deemed guilty of perjury, and upon conviction thereof, shall suffer the pains and penalties in that case provided. And the court upon the motion of the creditor, shall recommit the debtor to the prison from whence he was liberated, there to be detained for the said debt in the same manner as if such oath or affirmation had not been taken.

"SEC. 4. And be it further enacted, That the act, entitled "An Act to continue in force the act for the relief of persons imprisoned for debt," be and the same is hereby repealed.

"SEC. 5. And be it further enacted, That this act shall continue in force for the term of three years.

"Approved, May 28, 1796."

Chap. L., 1 Statutes at Large, 562.

"*An Act supplementary to an act entitled 'An Act for the relief of persons imprisoned for debt.'*"

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That any person imprisoned upon process issuing from any court of the United States in any civil action, against whom judgment has been, or shall be recovered, shall be entitled to the privileges and relief provided by an act, entitled, 'An Act for the relief of

persons imprisoned for debt,' under the regulations and restrictions of the same act, after the expiration of thirty days from the time such judgment has been or shall be recovered, though the creditor should not, within that time, sue out his execution, and charge the the debtor therewith.

"Approved June 6, 1798."

Chap. XLIX. 1 Statutes at Large, 562.

"*An Act providing for the relief of persons imprisoned for debts due to the United States.*

"SECTION 1. *Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled*, That any person imprisoned upon execution issuing from any court of the United States, for a debt due to the United States, which he shall be unable to pay, may, at any time after committment, make application, in writing, to the Secretary of the Treasury, stating the circumstances of his case, and his inability to discharge the debt; and it shall thereupon be lawful for the said secretary to make, or require to be made, an examination and inquiry into the circumstances of the debtor, either by the oath or affirmation of the debtor (which the said secretary, or any other person by him specially appointed, are hereby authorized to administer), or otherwise, as the said secretary shall deem necessary and expedient, to ascertain the truth; and upon proof being made to his satisfaction, that such debtor is unable to pay the debt for which he is imprisoned, and that he hath not concealed, or made any conveyance of his estate, in trust, for himself, or with an intent to defraud the United States, or deprive them of their legal priority, the said

secretary is hereby authorized to receive from such debtor, any deed, assignment, or conveyance of the real or personal estate of such debtor, if any he hath, or any collateral security to the use of the United States; and upon a compliance by the debtor with such terms and conditions as the said secretary may judge reasonable and proper, under all the circumstances of the case, it shall be lawful for the said secretary to issue his order, under his hand, to the keeper of the prison, directing him to discharge such debtor from his imprisonment under such execution, and he shall be accordingly discharged, and shall not be liable to be imprisoned again for the said debt; but the judgment shall remain good and sufficient in law, and may be satisfied out of any estate which may then, or at any time afterwards, belong to the debtor.

"SEC. 2. And be it further enacted, That if any person shall falsely take an oath or affirmation under this act, he shall be deemed guilty of perjury, and be subject to the pains and penalties provided in the third section of an act, intitled, 'An Act for the relief of persons imprisoned for debt.'

"SEC. 3. And be it further enacted, That the benefit of this act shall not be extended to any person imprisoned for any fine, forfeiture or penalty, incurred by a breach of any law of the United States, or for moneys had or received by any officer, agent, or other person for their use.

"Approved, June 6, 1798."

CHAP. IV., 2 Statutes at Large p. 5.

"*An Act for the relief of persons imprisoned for Debt.*

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That persons imprisoned on process issuing from any court of the United States, as well at the suit of the United States as at the suit of any person or persons in civil actions, shall be entitled to like privileges of the yards or limits of the respective gaols, as persons confined in like causes on process from the courts of the respective states, are entitled to, and under the like regulations."

"SEC. 2. *And be it further enacted*, That any person imprisoned on process of execution issuing from any court of the United States in civil actions, except at the suit of the United States, may have the oath or affirmation hereinafter expressed, administered to him by the judge of the District court of the United States within whose jurisdiction the debtor may be confined; and in case there shall be no district judge residing within twenty miles of the gaol wherein such debtor may be confined, such oath or affirmation may be administered by any two persons who may be commissioned for that purpose by the district judge, the creditor, his agent or attorney, if either live within one hundred miles of the place of imprisonment, or within the district in which the judgment was rendered, having had at least thirty days, previous notice by a citation served on him, issued by the district judge, to appear at the time and place therein mentioned, if he see fit to show cause why the said oath or affirmation should not be administered. At which time and place, if not sufficient cause,

in the opinion of the judge (or the commissioners appointed as aforesaid), be shown, or doth from examination appear to the contrary, he or they may, at the request of the debtor, proceed to administer to him the following oath or affirmation, as the case may be, viz: 'You solemnly swear (or affirm) that you have no estate, real or personal, in possession, reversion or remainder, to the amount or value of thirty dollars, other than necessary wearing apparel; and that you have not, directly or indirectly, given, sold, leased, or otherwise conveyed to, or intrusted any person or persons with all or any part of the estate, real or personal, whereof you have been the lawful owner or possessor, with any intent to secure the same, or to receive or expect any profit or advantage therefrom, or to defraud your creditors, or have caused or suffered to be done anything else whatsoever, whereby any of your creditors may be defrauded.' Which oath or affirmation being administered, the judge or commissioners shall certify the same under his or their hands to the prison-keeper, and the debtor shall be discharged from his imprisonment on such judgment, and shall not be liable to be imprisoned again for the said debt, but the judgment shall remain good and sufficient in law, and may be satisfied out of any estate which may then, or at any time afterwards, belong to the debtor. And the judge or commissioners, in addition to the certificate by them made and delivered to the prison-keeper, shall make return of their doings to the District court, with the commission, in cases where a commission hath been issued, to be kept upon the files and record of the same court. And the said judge, or commissioners, may send for books and papers, and have the same authority as a court of record, to compel the

appearance of witnesses, and administer to them, as well as to the debtor, the oaths or affirmations necessary for the inquiry into, and discovery of the true state of the debtor's property, transactions and affairs.

"SEC. 3. *And be it further enacted*, That when the examination and proceedings aforesaid, in the opinion of the said judge or commissioners, cannot be had with safety or convenience in the prison wherein the debtor is confined, it shall be lawful for him or them, by warrant under his or their hand and seals, to order the marshal or prison-keeper to remove the debtor to such other place convenient and near to the prison as he or they may see fit; and to remand the debtor to the same prison, if upon examination or cause shown by the creditor, it shall appear that the debtor ought not to be admitted to take the above recited oath or affirmation, or that he is holden for any other cause.

"SEC. 4. *And be it further enacted*, That if any person shall falsely take any oath or affirmation, authorized by this act, such person shall be deemed guilty of perjury, and upon conviction thereof, shall suffer the pains and penalties in that case provided. And in case any false oath or affirmation be so taken by the debtor, the court, upon the motion of the creditor, shall recommit the debtor to the prison from whence he was liberated, there to be detained for the said debt, in the same manner as if such oath or affirmation had not been taken.

"SEC. 5. *And be it further enacted*, That any persons imprisoned upon process issuing from any court of the United States, except at the suit of the United States, in any civil action, against whom judgment has been or shall be recovered, shall be entitled to the privileges and relief provided by this act, after the expiration

of thirty days from the time such judgment has been or shall be recovered, though the creditor should not within that time sue out his execution, and charge the debtor therewith.

"Approved, January 6, 1800."

CHAP. CXIV. 3 Statutes at Large, 399.

"*An Act, supplementary to an Act for the relief of persons imprisoned for debts due the United States.*"

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That any person imprisoned upon execution for a debt due to the United States, which he shall be unable to pay, if his case shall be such as does not authorize his discharge by the Secretary of the Treasury, under the powers given him by the act, entitled, 'An act providing for the relief of persons imprisoned for debt due to the United States,' may make application to the President of the United States, and upon proof being made to his satisfaction that such debtor is unable to pay the debt, and upon a compliance by the debtor with such terms and conditions as the President shall deem proper, he may order the discharge of such debtor from his imprisonment, and he shall be accordingly discharged, and shall not be liable to be imprisoned again for the same debt; but the judgment shall remain good and sufficient in law and may be satisfied out of any estate which may then, or at any time afterwards belong to the debtors.

Approved, March 3, 1817."

Chap. III, 4 Statutes at Large, page 1:

"*An Act supplementary to the act entitled 'An act for the relief of persons imprisoned for debt.'*

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the oath prescribed by the act entitled 'An act for the relief of persons imprisoned for debt,' passed on the sixth day of January, Anno Domini one thousand eight hundred, may be, in all cases, administered to the person entitled to take the same, either by any judge of the Supreme court of the United States, or by the district judge for the district within which such person may be, or by any person or persons commissioned by any judge of the Supreme court, or the said district judge, for that purpose.

"Approved January 7, 1824."

Chap. XXXIX, 4 Statutes at Large, page 19:

"*An Act supplementary to the act entitled 'An act supplementary to the act entitled 'An act for the relief of persons imprisoned for debt.'*'"

"*Be it enacted by the Senate and House of Representtatives of the United States of America in Congress assembled*, That the person or persons who shall or may be commissioned, either by any judge of the Supreme court of the United States, or by any district judge of the United States, to administer the oath prescribed by the act entitled 'An act for the relief of persons imprisoned for debt,' passed on the sixth day of January, Anno Domini one thousand eight hundred, shall and may have full power and authority to issue a citation directed to the creditor, his agent or attorney, if either lives within

one hundred miles of the place of imprisonment, requiring him to appear at the time and place therein mentioned, if he see fit, to show cause why the said oath or affirmation should not be so administered.

"SEC. 2. *And be it further enacted*, That if the creditor, his agent or attorney, lives within fifty miles of the place of imprisonment, only fifteen days' previous notice by citation shall be required.

"Approved April 22, 1824."

Chap. LXVIII, 4 Statutes at Large, page 278:

"*An Act further to regulate processes in the courts of the United States.*

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the forms of mesne process, except the style, and the forms and modes of proceeding in suits in the courts of the United States, held in those states admitted into the Union since the twenty-ninth day of September, in the year seventeen hundred and eighty-nine, in those of common law, shall be the same in each of the said states, respectively, as are now used in the highest court, of original and general jurisdiction of the same, in proceedings in equity, according to the principles, rules and usages which belong to courts of equity, and in those of admiralty and maritime jurisdiction, according to the principles, rules and usages which belong to courts of admiralty, as contradistinguished from courts of common law, except so far as may have been otherwise provided for by acts of Congress; subject, however, to such alterations and additions as the said courts of the United States respectively shall in their discretion deem expedient, or to such regulations as the Supreme court of

the United States shall think proper from time to time by rules to prescribe to any circuit or district court concerning the same.

"SEC. 2. *And be it further enacted*, That in any one of the United States where judgments are a lien upon the property of the defendant, and where by the laws of such state defendants are entitled in the courts thereof to an imparlance of one term or more, defendants in actions in the courts of the United States, holden in such state, shall be entitled to an imparlance of one term.

"SEC. 3. *And be it further enacted*, That writs of execution and other final process issued on judgments and decrees rendered in any of the courts of the United States, and the proceedings thereupon shall be the same, except their style, in each case respectively, as are now used in the courts of such state, saving to the courts of the United States in those states in which there are not courts of equity, with the ordinary equity jurisdiction, the power of prescribing the mode of executing their decrees in equity by rules of court: *Provided, however*, That it shall be in the power of the courts, if they see fit in their discretion, by rules of court, so far to alter final process in said courts as to conform the same to any change which may be adopted by the legislatures of the respective states for the state courts.

"SEC. 4. *And be it further enacted*, That nothing in this act contained shall be construed to extend to any court of the United States now established, or which may hereafter be established in the state of Louisana.

"APPROVED May 19, 1828."

Chap. XXXV, 5 Statutes at Large, p. 321.

"*An Act to abolish imprisonment for debt in certain cases.*"

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That no person shall be imprisoned for debt in any state, on process issuing out of a court of the United States, where by the laws of the state, imprisonment for debt has been abolished; and where by the laws of a state, imprisonment for debt shall be allowed, under certain conditions and restrictions, the same conditions and restrictions shall be applicable to the process issuing out of the courts of the United States; and the same proceedings shall be had therein, as are adopted in the courts of such state.

"Approved February 26, 1839."

Chap. II, 5 Statutes at Large, 410.

"*An Act supplementary to any act to abolish imprisonment for debt in certain cases.*"

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the act entitled 'An act to abolish imprisonment for debt in certain cases,' approved February twenty-eight, eighteen hundred and thirty-nine, shall be so construed as to abolish imprisonment for debt, on process issuing out of any court of the United States, in all cases whatever, where, by the laws of the state in which the said court shall be held, imprisonment for debt has been, or shall hereafter be abolished.

"Approved January 14, 1841."

Chap. CLXXX, 14 Statute at Large, p. 543.

"*An Act supplementary to the several Acts of Congress abolishing Imprisonment for debt:*

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That whenever, upon *mesne* process or execution issuing out of any of the courts of the United States, any defendant therein is arrested or imprisoned, he shall be entitled to discharge from such arrest or imprisonment in the same manner as if he was so arrested or imprisoned on like process of the state courts in the same district. And the same oath may be taken, and the same length of notice thereof shall be required, as is provided by such state laws; and all modifications, conditions, and restrictions upon imprisonment for debt, now existing by the laws of any state, shall be applicable to process issuing out of the courts of the United States therein, and the same course of proceedings shall be adopted as now are or may be in the courts of such states. But all such proceedings shall be had before some one of the commissioners appointed by the United States Circuit court to take bail and affidavits.

"Approved March 2, 1867."

Chap. CCLV. 17 Statutes at Large, 197.

An Act to further the administration of justice.

"SEC. 5. That the practice, pleadings, and forms and modes of proceeding in other than equity and admiralty causes in the circuit and district courts of the United States shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding: *Provided, however*, that nothing herein contained shall alter the rules of evidence under the laws of the United States, and as practiced in the courts thereof.

"SEC. 6. That in common law causes in the circuit and district courts of the United States the plaintiff shall be entitled to similar remedies, by attachment or other process against the property of the defendant, which are now provided for by the laws of the state in which such court is held, applicable to the court of such state; and such circuit or district courts may, from time to time, by general rules adopt such state laws as may be in force in the state in relation to attachment and other process; and the party recovering judgment in such cause shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are now provided by the laws of the state within which said circuit or district courts shall be held in like causes, or which shall be adopted by rules as aforesaid: *Provided* that similar preliminary affidavits or proofs, and similar security as required by such laws, shall be first furnished by the party seeking such attachment or other remedy.

"Approved June 1, 1872."

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1895.

In Re Petition of RUDOLPH DEIMEL. } (*Original.*) NUMBER 913.

BRIEF

IN OPPOSITION TO SAID PETITION FOR A WRIT OF CERTIORARI.

L. MAYER,
Attorney for Respondent.

John W. Arnold,
Marshal.

CHICAGO:
DONOHUE & HENNEBERRY,
PRINTERS, ENGRAVERS AND BINDERS,
415 Dearborn St.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1895.

In Re Petition of RUDOLPH DEIMEL. } (*Original.*) NUMBER 913.

BRIEF

In Opposition to Said Petition for a Writ of Certiorari.

STATEMENT OF THE CASE.

May It Please the Court:

The petition in this cause is filed by Rudolph Deimel, the relator, in the case of The United States, ex rel., Rudolph Deimel, vs. John W. Arnold, United States Marshal for the Northern District of Illinois, and seeks to obtain a review by certiorari under the sixth section of the Act of March 3, 1891, of the de-

cision in that case rendered by the United States Circuit Court of Appeals for the Seventh Circuit.

The petition itself, and the record of that case filed therewith under the rule of this Court, show that the proceeding sought to be reviewed was an appeal from a remanding order upon a hearing on the return of the Marshal upon a writ of habeas corpus. The petitioner is shown to have been held in custody by respondent as Marshal of the United States upon a writ of capias ad satisfaciendum. This writ, as the return of respondent to the writ of habeas corpus showed, was duly issued upon a judgment rendered against petitioner in an action, *ex delicto*, for fraud and deceit. (Printed Record of said case, p. 5.)

The petition for the writ of habeas corpus was not verified, as required by Sec. 754, Revised Statutes of the United States, the affidavit attached to it being a nullity.

There was no traverse of the return, but, as the petition herein, and the petition for the writ of habeas corpus in the Circuit Court show, the petitioner questioned his detention upon the ground that the issues in the action for fraud and deceit were tried by the Court without a jury, and that petitioner never in person signed any written waiver of trial by jury. It is further contended by petitioner that such a form of waiver of trial by jury is made condition precedent to imprisonment upon a judgment based on a finding by the Court without a jury by the Act of the General Assembly of Illinois, of *June 17, 1893*. This act, it is further contended by petitioner, applied to the trial of the said case in the United States Circuit Court in

which the judgment was rendered upon which he is detained. That his detention was, therefore, unlawful.

The action in which the said judgment was rendered was commenced in February, 1890, and formal waiver of trial by jury was duly signed by counsel for petitioner and filed in *October, 1892*. (Said Printed Record, p. 13.)

The questions involved in the case are thus seen to depend upon the construction of Sections 754 and 760 of the Revised Statutes of the United States, as to the verification of the petition for the writ, and as to the effect to be given the return of the Marshal to a writ of habeas corpus; or to depend upon the construction of said statute of Illinois, or upon such Acts of Congress as adopt State laws and statutes governing process, procedure, etc., i. e., Sections 721, 914, 916, 990 and 991, of the Revised Statutes of the United States.

I.

THE CASE DISCLOSED BY THE RECORD AND PETITION IS NOT SUCH A CASE AS IS REVIEWABLE BY THIS COURT UNDER THE ACT OF MARCH 3, 1891.

Federal appellate jurisdiction, under the Act of March 3, 1893, is divided as follows:,

1. Review by this Court of the decisions of the highest courts of the several States. The act expressly declares it does not modify or regulate this, and it is not involved in this case.

2. The direct and exclusive jurisdiction of this Court in the six classes of cases enumerated in Section 5 of the act. These are cases where the jurisdiction of the Court is in issue, where there is final sentence and decree in prize causes, conviction of a capital or otherwise infamous crime, construction or application of the Constitution of the United States, question of the constitutionality of any law of the United States, or of the validity or construction of any treaty made by it, or of the contravention of the Constitution of the United States by the laws or constitution of a State. These provisions do not affect this case.

3. The general appellate jurisdiction of the United States Circuit Court of Appeals. The sixth section of the act provides:

"That the Circuit Courts of Appeals established by "this act shall exercise appellate jurisdiction to re- "view by appeal or by writ of error final decision in the "District Court and the existing Circuit Courts in all "cases other than those provided for in the preceding "section of this act, unless otherwise provided by "law."

4. The final appellate jurisdiction of the United States Circuit Courts of Appeals. This is divided into two divisions.

(a) A division of five enumerated classes of cases in which the finality of such jurisdiction depends upon the discretion to certify to this Court by the Courts of Appeals, and the discretion of this Court to review by certiorari or otherwise. This division is constituted by the following parts of Section 6, which immediately follow the clause thereof quoted above:

"Sec. 6. * * * The judgments or decrees of "the Circuit Courts of Appeals shall be final in all "cases in which the jurisdiction is dependent entirely "upon the opposite parties to the suit or controversy "being aliens and citizens of the United States or citi- "zens of different States; also in all cases arising un- "der the patent laws, and under the criminal laws and "in admiralty cases, excepting that in every such sub- "ject within its appellate jurisdiction, the Circuit "Court of Appeals at any time may certify to the Su- "preme Court of the United States any questions or "propositions of law concerning which it desires the "instruction of that Court for its proper decision. "* * * And excepting also that in any such case "as is hereinbefore made final in the Circuit Court of "Appeals, it shall be competent for the Supreme Court "to require, by certiorari or otherwise, any such case "to be certified to the Supreme Court for its review "and determination, with the same power and author- "ity in the case as if it had been carried by appeal or "writ of error to the Supreme Court."

(b) A division of cases comprising all cases not within these enumerated classes, where less than one thousand dollars is involved. In these cases the decision of the Circuit Courts of Appeals is not reviewable. They are comprised within the last clause of Section 6, which is as follows:

"In all cases not hereinbefore, in this section, made "final, there shall be of right an appeal or writ of "error or review of the case by the Supreme Court of "the United States, where the matter in controversy "shall exceed one thousand dollars, besides costs."

5. The absolute jurisdiction of this Court, demandable as of right, to review all cases under this last clause, where over one thousand dollars is involved.

6. The discretionary power of this Court to review the decisions of the Circuit Courts of Appeals in the five classes of cases enumerated in the middle clause of Section 6, quoted supra.

This power is invoked by petitioner, and the first ground of objection to its exercise in this case is that the power is limited to the five classes of cases enumerated, and that this case is not within any of said classes.

Counsel for petitioner, in asking the Circuit Court of Appeals to certify the questions involved in this case to this Court, and in filing this petition, evidently considers this case as within the power to certify questions, and the power to review by certiorari, embraced in Section 6 of the Act of March 3, 1891.

The construction of counsel for petitioner must be that this power exists in all cases in which the whole section makes the decision of the Circuit Courts of Appeals final.

But after the enumeration of the five classes of cases in which the decision of the Circuit Courts of Appeals are to be final, the section makes an exception as to such cases, in the following language:

"* * * and in admiralty cases; *excepting* that "in every *such* subject within its appellate jurisdic-"tion, the Circuit Courts of Appeals may certify at "any time," etc.

It is to be noted that this provision as to cer-

tification is in form merely an exception to a provision as to the five enumerated classes of cases. But even if its form was not thus controlling, it is clear that to make it apply to all cases of appellate jurisdiction in the Circuit Court of Appeals would utterly ignore the word "such," which clearly applies only to, and restricts the provisions as to certification to, the five enumerated classes of cases. These embrace the most numerous cases arising under federal jurisprudence and those in which uniformity of decision is necessary to the equal protection of the residents of the various circuits. For they are the most common cases arising under federal laws, although of little political importance to the internal or foreign affairs of the government and people at large. When the provision as to review by certiorari is also examined, it is found that this provision is also an exception to the enactment regarding said five classes of cases only, and that by the words "such" and "hereinbefore," it unmistakably restricts its application to such classes of cases. It reads:

"And excepting also that in any *such* case as is "*hereinbefore* made final in the Circuit Courts of Ap-"peals it shall be competent for the Supreme Court" to review by certiorari, etc.

Up to this point in the section, the only provision as to finality is that as to the five classes of cases enumerated. The only other provision in the section making the Circuit Courts of Appeals a court of last resort is subsequent; is, in fact, the last clause in the section, being the restriction based upon the pecuniary amount involved, which is quoted above.

The provision of the sixth section of the Act of March 3, 1891, relating to review by certiorari, is clearly a mere exception or proviso to the declaration thereinbefore contained, that in five classes of cases the decisions of the Circuit Courts of Appeals should be final. Aside, then, from the fact that in terms it is limited to such cases, its form would so limit it.

"The proper function of a proviso being to limit the "language of the legislature, it will not be deemed "intended from doubtful words to enlarge or extend "the act or the provision on which it is engrafted."

Sutherland on Statutory Construction, Sec. 223.

Black on Interpretation of Statutes (1896), p. 271.

The provision as to review by certiorari is properly a proviso.

"When the terms are used with technical precision, "the distinction between a proviso and an exception is "this: 'An exception exempts absolutely from the "'operation of an enactment, while a proviso defeats "'its operation conditionally.'"

Black on Interpretation of Statutes, p. 271.

Being a proviso, the presumption and general rule is that it was intended to apply only as a modification of the general provisions which precede it, and to be confined to the limits of the preceding enactment which it modifies.

"A proviso is always to be construed with reference "to the immediately preceding parts of the clause to "which it is attached."

Endlich, Interpretation of Statutes, Sec. 186, p. 257.

Callaway vs. Harding, 23 Gratt., 543.

Wayman vs. Southard, 10 Wheat., 1, p. 30.

In Savings Bank vs. United States, 19 Wall., 227, 235, speaking of a proviso, this Court says:

"It is argued, however, that savings institutions "were relieved by the proviso to the section; that, of "course, is to be construed in connection with the sec- "tion of which it is a part, and it is substantially an "exception. It takes out of the operation of the body "of the enactment that which otherwise would be "within it. It restrains the generality of the previous "provisions."

Sutherland on Statutory Construction, Sec. 223, says:

"The natural and appropriate office of the proviso "being to restrain or qualify some preceding matter, "it should be confined to what precedes it, unless it "clearly appears to have been intended to apply to "some other matter." * * * "If it be a proviso to "a particular section, it does not apply to others un- "less plainly intended."

But in construing Section 6 of the Act of March 3, 1891, it is not necessary to rely upon this general rule

as to exceptions and provisos. The proviso as to review by certiorari in express and apt terms limits its application to the five enumerated classes of cases made final in the principal clause which it modifies. It makes an exception in providing for such review only "in any such case as is hereinbefore made final."

There is, therefore, no room for any contention that the general rule restricting the proviso to the limitations of the clause it modifies should not be applied in this case. By apt words, Congress has clearly shown its intent that this proviso, as to review by certiorari, should only apply to such cases as are in the prior parts of the act made final, i. e., the five enumerated classes of cases.

The general intent of the act further demonstrates the correctness of this construction as properly expressing the intent of Congress.

In American Construction Co. vs. Jacksonville Ry., 148 U. S., 372, 382, this Court says:

"The primary object of this act, well known as a "matter of public history, manifest on the face of the "act, and judicially declared in the leading cases un- "der it, was to relieve this Court of the overburden of "cases and controversies, arising from the rapid "growth of the country, and the steady increase of liti- "gation; and, for the accomplishment of this object, "to transfer a large part of its appellate jurisdiction "to the Circuit Courts of Appeals thereby established "in each judicial circuit, and to distribute between "this Court and those, according to the scheme of the

"act, the entire appellate jurisdiction from the Circuit "and District Courts of the United States."

See, also, United States vs. Am. Bell Telephone Co., 159 U. S., 548-551.

In accord with this general intent to restrict the classes of cases cognizable by this Court, a strict construction must be given to the proviso in question. Inasmuch as Congress has selected the five most important classes of cases enumerated as those over which this Court shall have a final supervisory and discretionary control, there should be, under the general intent and purpose of the act, as well as under the general rules governing the statutory jurisdiction of this Court, a strict limitation of such discretionary review to the classes of cases designated. The saving of the rights to certify and review by certiorari in "such" cases is to be construed as a negation of such rights in all other cases.

Endlich, Interpretation of Statutes, Sec. 397.
Ex parte McCardle, 7 Wall., 506.

In a case involving a similar proviso, the Court says, in Epps vs. Epps, 17 Ill. App., 196:

"It would seem that the same policy which dictates "a liberal construction of the statute in furtherance "of its general beneficial purpose would necessitate "a restricted construction of an exception by which "its operation is limited and abridged."

This is the general rule where a proviso introduces an exception to the general object sought by the act. In this case, the general object is to relieve this Court

of the weight of matters not involving such important questions, or such amounts as Congress considered requisite to any demand upon the Court's consideration. To construe this proviso as allowing the Circuit Courts of Appeals to certify questions in all cases where less than one thousand dollars is involved, or as allowing a demand upon the discretionary power to review by certiorari—and the allowance of one involves the allowance of the other—would be to defeat the intention to relieve this Court, throwing upon it a larger class of cases and a mass of controversies of less importance in amount involved and otherwise, than have ever before been reviewable by this Court.

The general rule which is applicable, and which demands a strict construction of the proviso in question, is well stated by Justice STORY, in United States vs. Dickson, 15 Peters, 141, p. 165, as follows:

"We are led to the general rule of law which has "always prevailed, and become consecrated almost as "a maxim in the interpretation of statutes, that "where the enacting clause is general in its language "and objects, and a proviso is afterwards introduced, "that proviso is construed strictly, and takes no case "out of the enacting clause which does not fall fairly "within its terms. In short, a proviso carves special "exceptions only out of the enacting clause; and "those who set up any such exception, must establish "it as being within the words, as well as within the "reason, thereof."

There should not, therefore, be any attempt in construing this act, to avoid the obvious limitation in-

tended by the words "such" and "hereinbefore," in this sixth section.

In addition to these general considerations arising from the rules of construction applicable to the clause in question are the decisions of this Court upon this act.

In United States vs. Amer. Bell Tel. Co., 159 U. S., 548, p. 551, this Court says:

"By section five of this act, appeals or writs of error "may be taken from the Circuit Court directly to this "Court in six specified classes of cases; where the "jurisdiction of the court below is in issue; in prize "causes; in cases of convictions of capital or other- "wise infamous crimes; in cases involving the con- "struction or application of the Constitution of the "United States; in cases in which the constitutional- "ity of any law of the United States, or the validity or "construction of any treaty made under its authority, "is drawn in question; in cases where the constitu- "tion or law of a State is claimed to be in contraven- "tion of the Constitution of the United States. Cases "in which the United States are plaintiffs or petition- "ers are not enumerated as falling within either of "these classes, nor are cases involving merely the con- "struction of a law of the United States, those or- "dinarily arising under the heads of jurisdiction in re- "spect of subjects-matter treated of in the sixth sec- "tion.

"By the sixth section, it is provided that the Circuit "Courts of Appeals shall have appellate jurisdiction " 'in all cases other than those provided for in the pre- " 'ceding section of this act, unless otherwise provided

"'by law.' The Courts of Appeals, therefore, have ap-
"pellate jurisdiction of all cases in which original
"jurisdiction is conferred on the Circuit Courts by rea-
"son of the United States being plaintiffs or petition-
"ers. It is further provided by that section that 'the
"'judgments or decrees of the Circuit Courts of Ap-
"'peals shall be final in all cases in which the juris-
"'diction is dependent entirely upon the opposite par-
"'ties to the suit or controversy, being aliens and citi-
"'zens of the United States or citizens of different
"'States; also in all cases arising under the patent
"'laws, under the revenue laws, and under the crim-
"'inal laws and in admiralty cases.' And the last
"paragraph of the section provides that 'in all cases
"'not hereinbefore, in this section, made final, there
"'shall be of right an appeal or writ of error or re-
"'view of the case by the Supreme Court of the United
"'States where the matter in controversy shall ex-
"'ceed one thousand dollars besides costs.' Judg-
"ments or decrees in cases in which the ground of
"jurisdiction of the Circuit Court is that the United
"States are plaintiffs or petitioners are not made final
"in terms, and such cases would fall within the last
"paragraph, unless restricted by the previous enu-
"meration. And the contention is that the words
"'cases arising under the patent laws,' must be held
"to operate as such restriction, and to render the judg-
"ments and decrees of the Circuit Courts of Appeals
"final, notwithstanding the existence of another dis-
"tinct ground of jurisdiction in the Circuit Court, and
"that there would consequently be a right of appeal
"from a decree of a Circuit Court of Appeals dismiss-
"ing a bill by the United States to cancel a patent for

"land, but none where the bill is one to repeal an in-"vention patent."

This case clearly recognizes what is manifest from the reading of the statute itself, that there is a class of cases in which the decision of the United States Circuit Courts of Appeals is final, and as to which no provision of law is made for a review either by a certificate from that Court or by writ of certiorari from this Court.

Any cases decided, appearing to ignore this construction of the act, will be found upon careful inspection to have involved questions of the validity and construction of treaties of the United States with foreign powers, and to have presented for consideration upon that basis, most important questions of international rights and international law.

In other words, cases in which there was no right of review in the Circuit Court of Appeals, but where the case should in the first instance have been appealed to the Supreme Court and it will be found that in fact a revenue or criminal law, or a law as to maritime jurisdiction (an admiralty case), was involved.

II.

THE QUESTIONS INVOLVED ARE NOT OF SUCH GRAVE AND GENERAL IMPORTANCE THAT THE REVIEW OF THIS COURT IS PROPERLY DEMANDED.

Even the petition does not allege that any matters of absolute right or privilege are involved in this case. Not the right to trial by jury, or the liability to imprisonment for fraud are involved, but the mere form in which a waiver of trial by jury is to be executed. There is only a minor and technical dispute over a single question of practice. The precise and ultimate issue is one which is absolutely local to the State and Federal Courts in the State of Illinois.

In fact, in logical sequence the first question to be settled is whether the stipulation signed by counsel for petitioner (p. 3 petitioner's argument) was not a sufficient compliance with the Act of Illinois of 1893. This involves the simple and local question of the construction of a state statute.

It is submitted that in fact there is nothing more in the case sought to be reviewed than this question, because the stipulation in question was a sufficient compliance with the Act of Illinois of 1893.

Naturally the Circuit Court of Appeals avoided giving a construction to a state statute, yet unconstrued by the state courts, and puts its decision upon a secondary but not less decisive federal aspect of the case.

But this question of the sufficiency of the stipulation under the state statute, answered under the au-

thorities, disposes of all the other questions raised by counsel. Answered as it must be answered before any question discussed by counsel for petitioner is raised, it makes the case so simple and clear that it is seen that there is no need of a writ of certiorari.

It is conceded by counsel for petitioner, that in the absence of the act passed by the legislature of Illinois, approved June 17, 1893, and in force July 1, 1893, entitled "An act to provide a trial by jury in all cases "where a judgment may be satisfied by imprison-"ment," the judgment in the present case entitled plaintiffs to an execution against defendant's body. But whether or not such concession were made, the law sustains that conclusion.

By act of 19 Hen. VII, C. 9 (A. D., 1503) the plaintiff who recovered a judgment in an action upon the case, was entitled to an execution against the defendant's body.

By Sect. 1, Chap. 28, Rev. Stat. of Ill. of 1874, the common law of England, and all statutes or acts of the British Parliament prior to the fourth year of James the First (1606) are adopted as the common law of Illinois. Hence the above act of 19 Hen. VII was adopted as, and became the law of Illinois, unless that result was prevented by Sect. 12 of Art. 2, Ill. Const. of 1870, or Sect. 5, Chap. 77, Rev. Stat. of Ill. of 1874. But the constitutional provision applies only to imprisonment for *debt*, and does not then apply where "there is a strong presumption of fraud."

And one of the exceptions contained in Sect. 5, Chap. 77, is "when the judgment shall have been ob-"tained for a tort committed by the defendant."

Hence, under the law of the State of Illinois, the plaintiffs in the judgment shown upon the record, had a right to an execution against the body of the defendant, unless they are deprived of that right per force of the act of the legislature of Illinois, approved June 17, 1893. That act is as follows:

"Be it enacted by the People of the State of Illinois, "represented in the General Assembly, that no person "shall be imprisoned for non-payment of a fine or a "judgment in any civil, criminal, quasi criminal, or "*qui tam* action, except upon conviction by jury. Pro- "vided, that the defendant or defendants in any such "action may waive a jury trial by executing a formal "waiver in writing; and provided further, that this "provision shall not be construed to apply to fines in- "flicted for contempt of court; and provided further, "that when such waiver of jury is made, imprison- "ment may follow judgment of the Court without con- "viction by jury."

Counsel for appellant contends that the stipulation contemplated by the above provision, in order to be effective, must be signed by the defendant or defendants in person; and that the stipulation in the present case was not so signed. This contention is made notwithstanding the findings of the trial court in the present case, recite that "on the stipulation in writing "of all the parties hereto, heretofore duly filed herein "by the attorneys of record for the parties to the suit, "with the clerk of this Court, this cause is submitted "to the Court for trial without the intervention of a "jury." (Printed Rec., 27.)

Counsel also contends that the stipulation upon

which this case was tried, was not so signed. Now suppose that, in this collateral proceeding, that finding and judgment can be contradicted by the alleged bill of exceptions, and suppose it does appear that the stipulation waiving a jury in the present case was not signed by the defendants in person, but by their attorneys; does the conclusion sought to be established by counsel for appellant follow? Does the act of 1893 require that the stipulation waiving a jury shall be signed by the defendant or defendants in person?

The practice in Illinois under statutes of similar phraseology and the authorities defining the powers of an attorney of record sustain the position that the stipulation executed by the defendants, by their attorneys of record, was all that the Illinois statute of 1893 requires.

In the Practice Act of Illinois, Ch. 110, Rev. Stat. of 1874, it is provided: "If the plaintiff shall not file his "declaration," * * * etc. (Sec. 18), "on the ap-"pearance of the defendant or defendants the Court "may allow such time to plead, etc. * * *" (Sec. "28), "if the plaintiff * * * shall file an affidavit, " * * * * etc." (Sec. 37.)

Young vs. Browning, 71 Ill., 44.

"In all cases, in any court of record in this state, if "both parties shall agree, both matters of law and "fact may be tried by the Court, * * * (Sec. 42)."

Phillips vs. Hood, 85 Ill., 450.
Burgwin vs. Babcock, 11 Ill., 28.

The practice and authorities above cited all show that under these provisions, as also where a statute provides that a party to a proceeding in a court of record shall or may do certain things, he may always act by such agent as the rules of law and the Court permit. *Qui facit per alium facit per se* is a maxim as old as the common law.

In Whitestown Milling Co. vs. Zahn, 36 N. E., 653 (Ind.,) it appeared that the attorneys of the defendants waived trial by jury. The next day the defendants in person repudiated the waiver and demanded a trial by jury, which was denied. The defendants refused to be bound by the action of their attorneys on the previous day. The Court says:

"The method of procedure in a court of justice is "usually complicated, and requires a person skilled "therein, in order to protect the rights of a party liti- "gant. A litigant generally finds it necessary to em- "ploy such a person in protecting or defending an ac- "tion. An attorney is one who is set in the turn or "place of another. He represents his client in all mat- "ters relating to the mode of procedure, and he may "bind his client in an action or special proceeding by "his agreement filed with the clerk, or entered upon "the minutes of the court, but not otherwise. He may "do on behalf of his client all acts, in or out of court, "necessary or incidental to the prosecution or man- "agement of the suit, which affect the remedy only, "and not the cause of action. * * * A mode pre- "scribed by law to enforce a duty or redress a wrong "is a remedy. Trial by jury relates to the remedy and "might be waived by the attorney of the appellant."

In People vs. Weeks, 57 N. W., 1091 (Mich.), the Court passed upon a statute requiring that if "the accused shall not have waived his right to trial by jury, "a jury shall be summoned." The trial judge asked the defendant if he desired a jury. The defendant, "the accused," said nothing, but his attorney replied that the Court could do as he chose about the jury.

The Supreme Court says:

"This amounted to a waiver and authorized a trial "by the Court."

In Wilson vs. Spring, 64 Ill., 16, the Court says:

"It has so far as we are aware, never been contested "that an attorney retained in a case, may, on the trial "make admissions and waive rights of his client which "will be as binding as if made by himself. This is "necessary from the very nature of the employment. " * * * It has been repeatedly held that an at-"torney may admit facts on the trial or in pleadings, "waive a right of appeal, review, notice, etc., and con-"fess judgment."

In Pierce vs. Perkins, 2 Devereaux's Ch., 250, (N. C.) the Court say:

"The authority of the attorney of record to make all "agreements for the conducting or determining the "suit cannot be disputed by his clients; other persons "are not to take notice of his private instructions or "his want of instructions. They have a right to con-"sider his authority full to manage the suit as the par-"ty himself could and the client must be bound by his "acts unless he can clearly establish collusion be-

"tween the attorney and the opposite party, which "here is not pretended."

In Smith vs. Bassard, 2 McCord Ch., 406, (S. C.), it was held that an act which was within the scope of the authority of the attorney could not be repudiated by the client and that a reference to accountants to settle the dispute, was a manner of disposing of the matter within an attorney's authority.

To the same effect is:

Brooks vs. New Durham, 55 N. H., 559.

Weeks on Attorneys at Law, 2nd Ed., 444, says:

"He, (an attorney of record) is also authorized to re- "ceive payment of satisfaction or waive irregulari- "ties."

I Am. and Eng. Ency. Law, 954, says, quoting from Moulton vs. Bowker, 115 Mass., 36-40:

"An attorney at law has authority by virtue of his "employment as such to do on behalf of his client all "acts, in or out of court necessary or incidental to the "prosecution or management of the suit and which "affect the remedy only and not the cause of action."

"He * * * may waive objections to evidence, "and enter into stipulations for the admission of facts "or conduct of the trial."

In Smith vs. Barnes, 29 N. Y. S., 692, after the cause had been set down for trial before a jury, the attorneys for the respective parties entered into a stipulation whereby a jury was waived and the cause referred to a referee, upon whose report there should be

entered a judgment from which neither party should appeal. Pursuant to such stipulation, the cause was referred, and judgment was entered upon the referee's report.

From an order denying a motion to set aside the stipulation and grant a new trial defendant appealed.

In an opinion affirming the judgment of the trial court, the Court said:

"Even assuming that the stipulation was made "without the knowledge or consent of either of the de- "fendants, we are inclined to think that the attorneys "had power to enter into that stipulation without spe- "cial authority, and that the defendants are bound by "the act of their attorney. It is a general rule that "proceedings regularly had by attorneys lawfully ap- "pearing for the respective parties, cannot, in the ab- "sence of fraud, be questioned by their clients because "of the want of specific authority to do the acts done "or consented to by them. Palm vs. Starr, 7 Hun., "422. The stipulation was proposed by the defend- "ants' attorney, and by it the defendants secured the "benefit of an adjournment, the waiver of a jury trial, "and the appointment of a referee named by them. "As a condition of granting the favor, both parties by "their attorneys united in a stipulation not to appeal. "The plaintiff was justified in assuming the authority "of the defendants' attorney to make the stipulation, "and, in consideration thereof, waived a default and "an inquest. The Court of Appeals, in Cox vs. Rail- "road Co., 63 N. Y., 414, held that the attorney for a "defendant might stipulate that the action should not "abate on the death of the plaintiff, in order to secure

"an adjournment of the trial, without special author-
"ity from the defendant. The Court said:

" 'It pertains to the procedure in the action, and it
" 'is a just implication that the authority of the attor-
" 'ney extends to the management of the cause in all
" 'the exigencies which arise during its progress. The
" 'attorney cannot compromise the claim of his client,
" 'or release the cause of action or satisfy a judgment
" 'in his client's favor, without payment, in the ab-
" 'sence of said special authority. There is no impli-
" 'cation of an authority to do acts of this character
" 'from his appointment as attorney in the case, and a
" 'party dealing with him is bound to take notice that
" 'they are not within the scope of his authority. But
" 'in matters relating to the conduct of the cause, his
" 'authority is very broad. Denton vs. Noyes, 6 Johns.,
" '296; Gaillard vs. Smart, 5 Con., 385; Gorham vs.
" 'Gale, 7 Con., 739; Corning vs. Southland, 3 Hill.,
" '552; Gainsford vs. Grammar, 2 Camp., 9.' "

Now if the bill of exceptions be looked to (Printed Record, p. 9-10) it will be seen that the stipulation set out on page 8 of the printed record was expressly entered into by the defendants in order that they might thereby procure a further adjournment of the cause; that thereafter, on January 23, 1894, in open court, "in the presence of all the parties hereto," Judge Grosscup announced that all cases, including this case, in which trial by jury had been waived, would be set for trial in March, 1894, before Judge Bunn; and that on January 31st, 1894, with the consent of the attorneys for all parties hereto, Judge Grosscup

set this case for trial on March 21, 1894, before Judge Bunn. (Printed Record, p. 10.)

Within the rule of the above cases, the making of the stipulation set out in the bill of exceptions, was, therefore, within the general implied powers of defendants' attorneys, and when the attorneys signed that stipulation it was for all purposes, executed by the defendants. Through that stipulation defendants procured an adjournment which they could not otherwise procure.

In Scarrett Furniture Co. vs. Moser, 48 Mo. App., 543, the attorneys for the respective parties entered into a stipulation that the judgment in that case should abide the result of a certain other case then pending. Thereafter, one of the parties sought to evade the stipulation on the ground that his attorney had no authority to bind him thereby. In passing upon the question thus raised, Judge THOMPSON said:

"The next contention is, that the attorney, who then "represented the garnishee creditor, had no implied "authority so to stipulate, and this contention is "founded on the argument that counsel in a case can "have no implied authority to stipulate that a case, "for which counsel are retained, shall abide the result "of another case which is prosecuted by a different "party, and under control of different counsel. 'We "do not agree with this contention. An attorney in "charge of a case has implied authority from the client "to enter into any stipulation for the control of the "progress of the action, even to the entering of judg-"ment in favor of the opposite party. Thompson vs.

"Pershing, 86 Ind., 304, 310; 1 Thomp. Trials, Sec. 191, "and cases cited."

In Thompson vs. Pershing, 86 Ind., 303, the question was presented as to whether or not an attorney employed by and appearing for a party, had authority to enter into a stipulation upon which judgment was taken against such party. In disposing of that question, the Court, per Commissioner Morris, said: "The "allegation in the complaint, that the attorney of the "appellant had no authority to make the agreement "upon which the judgment was rendered in the orig-"inal action, must be understood to mean that the ap-"pellants had not, in fact, authorized him to make the "agreement. But by employing him to appear for "them in the action as their attorney, they did im-"plicitly authorize him to make such agreement. An "attorney may, without express authority, bind his "client by agreement that judgment may be taken "against him, and that, too, though the attorney knew "that his client had a good defense to said action."

Greenleaf on Ev., Vol. 2, Sect. 141, says:

"The effect of a retainer, to prosecute or defend a "suit is to confer on the attorney all the powers exer-"cised by the forms and usages of the court in which "the suit is pending. He may receive payment; may "bring a second suit after being nonsuited in the first "for want of formal proof; may sue a writ of error on "the judgment; may discontinue the suit; may re-"store an action after *not pros;* may claim an appeal "and bind his client by a recognizance in his name for "the prosecution of it; may submit the suit to arbi-

"tration; may sue out an alias execution; may re-
"ceive livery of seizin of land taken by extent; may
"waive objection to evidence, and enter into stipula-
"tion for the admission of facts, or conduct of the
"trial; and for release of bail; may waive the right of
"appeal, review, notice, or the like, and confess judg-
"ment." * * *

There are certain cases where it is held that a defendant himself cannot waive a trial by jury.

Of this class are:

Cancemi vs. The People, 18 N. Y., 128.
Harris vs. The People, 128 Ill., 585.
Morgan vs. The People, 136 Ill., 161.

Of course, in such cases, a waiver could not be adjudged upon the acts or conduct of the attorney. The retainer does not authorize the attorney to do that which the party himself cannot do.

But in Wilson vs. Spring, supra, (64 Ill., 16) the Court says:

"It has been repeatedly held that an attorney may
"admit facts on the trial, or, in pleading, waive a right
"of appeal, review, notice, etc., and confess judgment.
"Talbot vs. McGee, 4 Monr., 377; Pike vs. Emerson, 5
"N. H., 393; Alton vs. Gilmanton, 2 ib., 520.

"In the case of Herbert vs. Alexander, 2 Call, Va.
"R., 498, it was held that an attorney represents his
"client, and in court may do such acts as his client
"might do himself."

In Baird vs. Mayor of New York, 74 N. Y., 382, Justice ANDREWS said:

"The constitutional right, in civil cases, to a jury "trial, is a private, individual right, and is no more "sacred than other rights secured by constitutional "guaranty, and I perceive no reason why it may not "be waived in any mode, or that a waiver may not be "adjudged upon any evidence which would be suffi-"cient to constitute a waiver of rights in other cases."

In State vs. Polson, 29 Iowa, 133, defendant was tried upon an indictment for an assault to commit murder. At a prior term, he had been tried upon an indictment for robbery. Both prosecutions resulted from the same unlawful acts.

The Constitution of Iowa provides that:

"In all criminal prosecutions, and in cases involv-"ing the life or liberty of an individual, the accused "shall have a right * * * to be confronted with "the witnesses against him."

Upon the first trial, the testimony of certain witnesses was reduced to writing. At the second trial, upon stipulation between the district attorney and counsel for defendant, the testimony taken at the former trial was read before the jury. From a judgment of conviction defendant appealed, and among other grounds of error set up that he had been denied his constitutional right to be confronted with the witnesses against him. In disposing of that question, BECK, J., said:

"It will be observed that the right secured by this "provision to the accused, to be confronted with the "witnesses against him, is a personal right limited to "proceedings in criminal prosecutions, or where the

"life or liberty of the citizen is involved. The pro-
"vision is not in the nature of an inhibition upon a pro-
"ceeding not in accord with the one secured. Neither
"is it in the nature of a jurisdictional limitation upon
"the authority of the court prohibiting the exercise of
"power except in the manner specified. It secures
"simply a personal right, and in no manner affects the
"jurisdiction of the court when the prosecutions are
"tried. It very clearly appears that this right, in
"proper cases, when no wrong can be done the ac-
"cused, may be waived."

And in that case the Court held that the stipulation between the district attorney and defendant's counsel operated as such waiver.

State vs. Tuller, 34 Conn., 280, was a prosecution upon information, charging theft and embezzlement. After the jury had retired, counsel for defendant was informed by another member of the bar, that one of the jurors had expressed an opinion that defendant was guilty. This was not communicated to the defendant in person, nor did he know of it until after the jury had returned a verdict finding him guilty. Thereupon this fact was set up in a motion in arrest of judgment. The motion was overruled, and defendant appealed. In disposing of the question, BUTLER, J., said:

"The case has been argued upon the assumption
"that the knowledge of the counsel was not the
"knowledge of the prisoner; but, if that were true,
"it would not aid the prisoner in this case; for the
"counsel who received the information were man-

"agers of the case, and had authority to waive ob-"jections; and the motion would be defective, and "the prisoner could take nothing by it, because it is "not alleged that the counsel were ignorant of the "objection to the jury.

"It is further claimed, that if counsel did know, "the prisoner is not chargeable with their waiver, be-"cause the counsel had no power to waive the objec-"tion. This claim is not tenable. The prisoner, or "his counsel for him, may waive any objection in a "case not capital. The cases of McKay [1] and Can-"cemi [2] were capital ones, and, therefore, if law, are "not in point. For these reasons the motion in arrest "should be overruled."

The books contain no case which holds that an attorney employed to prosecute or defend a suit, can not, by virtue of his retainer, and without special authority stipulate to waive a trial by jury, provided such stipulation could be made by the party himself.

It can not be contended that the act of June 17, 1893, lessened in any degree the liability of a perpetrator of a fraud, for the consequence of his fraudulent act. The statute neither imposes a liability nor impairs the liability then existing; it simply prescribes a method of procedure. The step which it requires to be taken is fully within the authority exercised by every attorney in the conduct of a case. Within the meaning of the above section, a stipulation signed by the attorney of record, is executed by his client.

[1] 18 Johns. 212; [2] 18 N. Y., 128, in both of which it was held that the defect claimed to have been waived, was jurisdictional, and therefore could not be waived.

The uniform rule, as illustrated by the authorities, *supra*, is that in all matters pertaining to the trial, and the proceedings in court, the attorney stands for, and represents the litigant. Within that sphere, the acts of the attorney are the acts of his client. A stipulation, signed by the attorney, is as binding as though signed by the party whom he represents.

Did the legislature of Illinois intend to change that rule so far as waiving trial by jury is concerned, and is that intention clearly and unmistakably expressed by the language of the above act? That language is: "Provided, that the defendant or de-"fendants, in any such action may waive a jury trial "by executing a formal waiver in writing."

Is this language to be construed in accordance with the settled rule of law, that the attorney represents and acts for his client in all matters pertaining to the conduct of the cause in court? Or is it to be construed as changing that rule? Under that rule, a stipulation to waive a jury is executed by defendant, when it is signed by his attorney. Moreover, the authorities cited *supra* show that, in the absence of an express statute to the contrary, the act of the attorney in waiving a jury trial need not be evidenced by a stipulation in writing.

But counsel contends that this statute should receive a strict construction, because it concerns the personal liberty of the defendants. He says: "To "construe this statute to authorize imprisonment "where there had been a waiver in writing by the "attorney would not be to construe it strictly, but "would be to extend its operation beyond the clear

"legal meaning of the terms employed. It would be "to deprive the defendants of their liberty contrary "to the express provision of the statutes."

This exposes the fallacy which underlies the entire argument of counsel. The statute here involved is not penal, neither does it impair the liberty of the subject.

Petitioner's liability to imprisonment under execution issued on the judgment disclosed upon this record, is not imposed by the act of 1893. Such liability existed before that act was passed; and such imprisonment might follow even though the trial was without a jury, and even though the waiver of a jury was made by the attorney, and was not in writing. The question here is: How far has the act of 1893 changed these rules of law? This question is answered by reference to a well settled principle of statutory construction.

"The presumption is that the legislature does not "intend to change or modify the law beyond what it "explicitly declares, either in express terms, or by un- "mistakable implication; for it is not to be supposed "that the legislature will overturn an established "principle of law without expressing such intention "with irresistible clearness."

Am. & Eng. Ency. of Law, Vol. 23, p. 357.

"It is observable from the decisions referred to in "the preceding sections, that the presumption against "an intent to alter the existing law beyond the imme- "diate scope and object of the enactment under con- "sideration, applies as well where the existing law is

"statutory, as where it is promulgated by decisions. "It refers to the whole system of pleading and prac- "tice to which the statute applies, and of which its "rules are to form a part. The latter must be con- "strued consistently with the former, and it refers "equally to the common law, in whose rules and prin- "ciples a statute is not presumed to make any change "beyond what is expressed in its provisions, or fairly "implied in them, in order to give them full opera- "tion."

Endlich on Interpretation of Statutes, Sec. 127.

Again:

"An intention to change the rule of the common "law will not be presumed from doubtful statutory "provisions, the presumption is that no such change "is intended unless the statute is explicit and clear "in that direction. The common law will be held no "further abrogated than the clear import of the lan- "guage used in the statute requires."

Sutherland on Stat. Const., Sect. 139.

"The best construction of a statute is to construe "it as near to the rule and reason of the common law "as may be, and by the course which that observes in "other cases. Where a statute directs anything to be "done generally and does not appoint any special "manner, it is to be done according to the course of "the common law."

Sutherland on Stat. Const., Sec. 290.

The language of the act under consideration is:

"Provided, that the defendant or defendants, in "any such action, may waive a jury trial by executing "a formal waiver in writing."

In applying to this language, the above canons of construction, the following propositions must be kept in mind:

(1.) At the time the act of 1893 was passed, both the common law and the statutes of Illinois gave the plaintiff a right to take the defendant's body on execution issued upon such a judgment as is shown upon this record.

(2.) That right existed even though the trial was had without a jury, and even though a jury was waived by the defendant's attorney, and such waiver was not in writing.

(3.) In all matters pertaining to the proceedings in court, the defendant was represented by and acted through his attorney, and the acts of the latter were for all purposes the acts of the former.

Now, construing the act of 1893 in accordance with the above rules of construction, and in the light of the foregoing propositions, which indicate the condition of the law at the time that act was passed, in what respect and to what extent has the legislature of Illinois declared its intention to change the then existing law?

The legislature does say that the stipulation to waive a jury must be in writing, but it does not say that such stipulation must be signed by the defend-

ant in person. The legislature was dealing with a question of procedure, in which the usual course, and the course recognized by law, was for the defendant to act through his attorney. It is in the light of that usual and legally recognized course of procedure, that the language of the act must be considered. Had the legislature intended to change that course and require the defendant to act in person, rather than through his attorney, it would have been very easy to have so stated in the act. But they have not done so. Before the passage of that act, a stipulation to waive a jury, would be held to be "executed" by the defendant, when it was signed by his attorney; and the act evidences no intention on the part of the legislature to change that rule. If the act concerned a procedure in which the usual and legally recognized course was for a person to act in person rather than by attorney, there might be some basis for an argument that the "formal waiver" must be signed by the defendant in person. But the act must be construed in the light of the then existing law; and must be held to change that law only where such an intention is clear.

Tested by these rules, the stipulation shown in the bill of exceptions (Printed Record, 19), is entirely sufficient under the Illinois statute of 1893.

While the Circuit Court of Appeals did not rest its decision upon this construction of the act of Illinois, the Circuit Court did base its opinion in part upon the fact that the stipulation quoted in the petition herein was a sufficient compliance with the statute of Illinois. That was the first question in the case, was

correctly decided, and is not a question calling for the review of this Court.

In re Woods, 143 U. S. 202, this Court says:

"In Lau Ow Bew, Petitioner, 141 U. S. 583, it was "held that the power of this Court to require a case "in which the judgment and decree of the Circuit "Court of Appeals is made final, to be certified for review and determination, * * * could only be "invoked * * * when questions of gravity and "importance were involved. This must necessarily "be so in any view, and especially when it is con- "sidered that the Circuit Courts of Appeals were "created for the purpose of relieving this Court of "the oppressive burden of general litigation, which "impeded the examination and disposition of cases "of public concern, and delayed suitors in the pur- "suit of justice. But in the interest of jurisprudence "and uniformity of decision, to use the language of "the eminent jurist and statesman who had charge "of the bill, provision was made under Section 6 for "such supervision on our part as would tend to avert "diversity of judgments and guard against inadvert- "ence of conclusion in controversies involving "weighty and serious matters. In the matter of Lau "Ow Bew, the construction of Acts of Congress in the "light of treaties with a foreign government, and the "status of domicil in respect of nations of one coun- "try domiciled in another, a matter of international "concern, was brought under consideration upon the "record, and we were of opinion that the grounds of "the application were sufficient to call for our inter- "position. But we do not regard the inquiry as to

"whether it was settled law in the State of Minnesota "that a judgment of dismissal in a former suit, such as "pleaded here, was not a bar to a second suit upon the "same cause of action, or whether the law in respect "of recovery by a servant against his master for injur- "ies received in the course of his employment was "properly applied on the trial of this case, as falling "within the category of questions of such gravity and "general importance as to require the review of the "conclusions of the Circuit Court of Appeals in refer- "ence to them."

See Chicago & N. W. Ry. Co. vs. Osborne, 146 U. S. 354.

In American Const. Co. vs. Jacksonville Ry., 148 U. S. 372-383, this Court says:

"In the same spirit, the authority conferred on this "Court by the very provision on which the petitioners "mainly rely, by which it is enacted that 'in any such "'case as is hereinbefore made final in the Circuit "'Court of Appeals, it shall be competent for the "'Supreme Court to require, by certiorari or other- "'wise, any such case to be certified to the Supreme "'Court for its review and determination, with the "'same power and authority in the case as if it had "'been carried by appeal or writ of error to the "'Supreme Court,' has been held to be a branch of its "jurisdiction which should be exercised sparingly "and with great caution, and only in cases of peculiar "gravity and general importance, or in order to secure "uniformity of decision, (citing cases). Accordingly, "while there have been many applications to this

"Court for writs of certiorari to the Circuit Court of "Appeals under this provision, two only have been "granted: the one in Lau Ow Bew's case, above cited, "which involved a grave question of public interna- "tional law, affecting the relations between the "United States and a foreign country; the other in "Fabre, Petitioner, No. 1237, of the present term, "an admiralty case, which presented an important "question as to the rules of navigation, and in which "the decree of the Circuit Court of Appeals for the "Second Circuit reversed a decree of the District "Judge, and was dissented from by one of the three "Circuit Judges; and in each of those cases the Cir- "cuit Court of Appeals had declined to certify the "question to this Court."

The decisive questions in this controversy involve only the construction of the Illinois Statute of 1893, and the purely local and technical question of practice in the Federal Courts sitting in that State.

It is submitted that there is not a sufficiently grave or important question involved to call for a review by this Court.

III.

THE QUESTIONS ASSERTED TO BE INVOLVED ARE NOT PRESENTED BY THE RECORD.

The proceedings sought to be reviewed were on habeas corpus.

The 760th Section of the Revised Statutes of the United States provides in regard to relief by habeas corpus:

"The petitioner, or the party imprisoned or re-"strained may deny any of the facts set forth in the "return, or may allege any other facts that may be "material in the case. Said denial or allegations shall "be under oath. The return and all suggestions made "against it may be amended by leave of the Court or "Justice or Judge, before or after the same are filed "so that the material facts may be ascertained."

The effect of this statute is that the issues to be tried by the Court hearing the motion on the writ must be made up on written pleadings under oath, if the issue is to be anything more than that raised by demurrer or exception to the return.

In the case sought to be reviewed, there was, on behalf of the petitioner, no denial of the truth of the return, or allegation of facts in confession and avoidance of it, either in writing or under oath.

Moreover the petition is not verified, for the affidavit lacks any signature, and there is no means of ascertaining that anybody swore to it. (Printed Record, 5.)

So that the petition was absolutely of no effect, and the petitioner was properly remanded. (Sec. 754, Revised Statutes of the United States.)

In re Keeler, Hempst, 306, Fed. Case No. 7637.

The issue determined by the trial court was at most whether the return of the marshal was sufficient on its face.

In Crowley vs. Christensen, 137 U. S., 86, this Court passed upon the issues thus raised on the return, without either denial or allegations in writing and under oath, of matters in avoidance, and says, page 94:

"It would seem that some stress is placed upon the "allegation of the petitioner (in the petition), that "there were not twelve persons owners of real prop-"erty in the block where the business was to be "carried on. This allegation is denied in the return, "which alleges that there were more than sixteen "such property owners. As the case was heard upon "exceptions or demurrer to the return, its averments "must be taken as true. At common law no evidence "was necessary to support the return. It was deemed "to import verity until impeached. * * * And "this rule is not changed by any Statute of the United "States."

There can be no doubt that the return of the Marshal showed that the relator was detained under lawful process issued by a court of competent jurisdiction.

In such case, Church on Habeas Corpus, 2d Ed., 133, p. 205, says:

"In the courts of the United States the general "doctrine is that 'when the imprisonment is under "'process, valid on its face, it will be deemed *prima* "*facie* legal, and the prisoner must assume the bur-"'den of impeaching it by showing a want of juris-"'diction in the magistrate or court whence it eman-"'ated.'"

See, also,

Matter of Mason, 8 Mich., 72, 74.

In the case at bar the relator, by attempting to show (over the Marshal's objection) by proof of matters, dehors the return, facts to avoid its force, recognized the undoubted *prima facie* sufficiency of the return.

But as the petitioner had not laid proper foundation for such evidence by the requisite traverse of the return under oath and offered no competent evidence in support of his contention, the order remanding the relator to the custody of the appellee was properly and necessarily entered.

It is evident that if this question is in the case, its decision involves no doubt, or conflict of authorities. It is not necessary or important that the old rule that the return of the Marshal can not be contradicted, unless as provided by statute, should be reannounced.

Prior to the passage of Section 960 of the Revised Statutes, no denial of the return of the Marshal was permitted.

Ex parte Jenkins, 2 Wall. Jr., 521; Fed. Case No. 7259.

Ex parte Sifford, 5 Am. L. Reg., 659; Fed. Case No. 12848.

The purpose of the writ as it existed at common law, and as it was when relief under it was guaranteed by the Constitution, was not to examine into the merits of the detention of the prisoner, but only to determine in a public manner the authority for and cause of the detention.

This end was gained by the official return of the respondent, showing the authority for the restraint upon the liberty of the prisoner; an examination into the truth of the return was not permitted.

Church on Habeas Corpus, 2d Ed., Sec. 149, says:

"The general English doctrine, both under the com-"mon law and the Statute of 31 Car. II, is that the "truth of the return cannot be controverted with a "view to the discharge of the prisoner."

Inasmuch as Section 760 thus appears to have established a statutory exception, the right to traverse the Marshal's return depends upon it, and may be exercised only by means of strict compliance with the provisions of that section.

IV.

THERE IS NO DOUBT THAT THESE QUESTIONS COULD NOT BE RAISED ON HABEAS CORPUS.

It is not asserted that the trial court in the action on the case for fraud and deceit did not have jurisdiction; that the defendants therein were not duly found guilty, and that judgment did not duly go against them. It is not, in fact, alleged that anything was erroneous, except the finding in the judgment that the cause was submitted to the Court on the stipulation in writing of the defendants waiving trial by jury. (Printed Record, p. 23.)

Counsel for petitioner recognized the propriety of direct attack on this finding in the judgment, making a motion to amend it, and moving to quash the writ of *capias ad satisfaciendum*, and prosecuted a writ of error therefrom, which resulted in the affirmance of the rulings of the trial court. (69 Federal Reporter, 987.)

Comparing the judgment and the finding of the trial court, and the Statute of Illinois of 1893, it is seen that the only question was whether the judgment and finding were supported by the evidence and record in the original action in case.

The Statute.	Finding.
"Provided, that the de-	"This cause coming on
"fendant or defendants in	"now to be heard before
any such action may	"the Court without the in-
waive a jury trial by en-	tervention of a jury, a

"cuting a formal waiver "in writing."

"jury having heretofore "been expressly waived, "by stipulation in writing "of all the parties hereto." (Printed Record, p. 23.)

The Judgment.

"On the stipulation in "writing of all the parties "hereto, heretofore filed "herein by the attorneys "of record for the parties "to this suit, with the "clerk of this Court, this "cause is submitted to the "Court for trial without "the interveation of a "jury." (Printed Record, p. 27.)

The judgment and finding explicitly declare that there was such a stipulation as required by the statute.

Therefore, to open the questions discussed by petitioner, it must be shown that the judgment and finding were erroneous.

It is clear that if the trial court in the original action erred in finding and adjudging that the defendants therein had made a stipulation in writing, waiving a trial by jury, its decision was only erroneous. The judge who tried the case had as much jurisdiction to pass upon the various stipulations made, as any Court. The point was expressly and necessarily passed on by the trial court. (Printed Record, p. 11.)

His determination was *res adjudicata* on the proceedings on habeas corpus.

It could not be reviewed on habeas corpus.

Brown on Jurisdiction, Section 104, page 284, says:

"The Court, having jurisdiction of the subject-mat-
"ter and of the defendant, may, by reason of errors not
"going to the merits, enter a judgment voidable on
"appeal, but such errors cannot be reviewed by
"habeas corpus. An irregularity is the want of ad-
"herence to some prescribed rule or mode of pro-
"ceeding; it consists in either omitting something
"that should be done for the orderly conduct of a
"suit, or doing something in an unseasonable time.
"While void and voidable judgments may be reversed
"on appeal, it is from custody under the void judg-
"ment that habeas corpus releases the prisoner."

Church on Habeas Corpus, Section 363, is to the same effect.

Even if the question was properly in issue before the trial court on the proceedings in habeas corpus, as to whether there had been a sufficient waiver of trial by jury, the Court could not upon such proceedings hold the judgment void. If the trial court in the original action in case went entirely wrong on this question of waiver, the irregularity complained of would be unavailable on habeas corpus.

In Kelly vs. People, 115 Ill., 583, a person indicted for robbery pleaded "not guilty," waived a trial by jury and was found guilty and was sentenced to the penitentiary for one year. In a collateral proceeding the invalidity of this conviction was alleged, but the Court held that it was only erroneous, although the defendant could not waive a jury legally

in a trial on a charge of felony. The irregularity being merely error, the Court held that it could not be urged on a collateral attack.

In re Mason, 8 Mich., p. 70, decides that, although the Court erroneously found the age of a defendant to be such that he could be sentenced to a reform school, and so sentenced him, the error could not be taken advantage of on habeas corpus, although the evidence on the trial was absolutely conclusive that the judge had made a careless mistake, and that the prisoner could not under the law be sentenced to the reform school.

In re Devoe, 1 Lowell, p. 251, Federal Cases 3842, holds that upon habeas corpus to release a prisoner arrested in a civil action for fraud and deceit, no examination of the evidence of the case can be permitted to impair the prima facie sufficiency of the record.

In Bell vs. State, 4 Gill (Md.), p. 301, the Court says where habeas corpus proceedings were instituted to release a prisoner held on ca. sa., "it cannot "be held that the Court upon this writ had the power "to look beyond the judgment and re-examine the "grounds on which it was rendered and practically "reverse it."

In ex parte Watkins, 3 Peters, p. 193, this Court was asked to examine the indictments upon which the prisoner had been convicted. Chief Justice MARSHALL said of the power of the trial court:

"The Circuit Court of the District of Columbia is "a court of record, having general jurisdiction over

"criminal cases. An offense cognizable in any court "is cognizable in that court. If the offense be pun- "ishable by law that court is competent to inflict the "punishment. The judgment of such a tribunal has "all the obligations which the judgment of any tribu- "nal can have. To determine whether the offense "charged in the indictment be legally punishable or "not, is among the most unquestionable of its powers "and duties. The decision of this question is the "exercise of jurisdiction, whether the judgment be "for or against the prisoner. The judgment is equally "binding in the one case and in the other, and must "remain in full force unless reversed regularly by "a superior court capable of reversing it."

So in this case the finding and judgment of the trial court that the stipulation was a sufficient waiver was as valid and binding an exercise of judicial power as any court can make on the question.

This is the law of Illinois in regard to any question of jurisdiction arising out of the interpretation of a statute. In People vs. Garnett, 130 Ill., p. 340, the question is settled that a court which takes or rejects jurisdiction by reason of its judicial interpretation of a statute is exercising a jurisdiction which cannot be questioned collaterally. This Court has uniformly held the same rule.

Ex parte Parks, 93 U. S., p. 18.
Ex parte Railway Co., 103 U. S., p. 794.
Ex parte B. & O. Ry. Co., 108 U. S., p. 566.
Van Fleet Collateral Attack, Sec. 89.

In re Boyd, 1 U. S. App., p. 73, 49 Fed., p. 48, is an example of this rule. The commissioner committed

the prisoner on a charge of bringing "beer" into the Indian Territory, contrary to Section 2139 of United States Revised Statutes forbidding the introduction of "spirituous liquors into the Indian Territory." On habeas corpus proceedings it was attempted to show that "beer" was not a "spirituous liquor." The Circuit Court of Appeals for the Eighth Circuit says:

"It was the duty of the commissioner to hear and "determine the issue thus tendered, and to hear and "determine it like any other question of law or fact "that might arise in the course of the trial."

The force of these authorities cannot be escaped by the assertion that the finding as to waiver of trial by jury was jurisdictional. It is evident that, having jurisdiction to pass upon the jurisdictional fact, no error in doing so can be questioned collaterally.

> Kelly vs. People, 115 Ill., 583, ubi supra.
> In re Wilson, 140 U. S., 575.

In ex parte Smith, 3 Nevada, 338, the record showed affirmatively that there was no interval of time between the plea of guilty and the sentence of the prisoner. A statute of Nevada positively requires an interval of at least two days. Upon habeas corpus proceedings the Supreme Court held that the judgment, although erroneous, could not be attacked collaterally, and the prisoner was remanded.

In ex parte Farnham, 3 Col., 545, it was held that although the prisoner had a constitutional right to be present when judgment was rendered upon the verdict, and the Court rendered judgment in his ab-

sence, no relief would be given on habeas corpus proceedings, and he was remanded.

In Turney vs. Barr, 75 Iowa, 753, a most extreme case of the same nature arose, where the prisoner was not present at all during the trial, being in the custody of the sheriff, but the Court refused to interfere, upon habeas corpus proceedings, with his restraint under judgment.

See, also, to the same effect:

Ex parte Reed, 100 U. S., 13.
State vs. George, 53 Ind., 434.
Hurd on Habeas Corpus, Sec. 382.
Cooley Const. Lim., 4th Ed., pp. 347, 348.
1 Black on Judgments, Sec. 255, note 56.

V.

THE RECORD DOES NOT SHOW THAT THE QUESTIONS ASSERTED TO BE IN THE CASE BY THE PETITION WERE EVER RAISED BY COMPETENT EVIDENCE.

It is assumed in this discussion that the Court will, upon this motion, make such examination of the record as is necessary to determine what questions it really presents. If an examination of the record discloses a Marshal's return sufficient on its face, and not contradicted in law, or if the proceedings in the habeas corpus are clearly seen to be too narrow in their legal scope to embrace any of the questions suggested by the petition, it is presumed that this Court will rest satisfied that there are no questions involved worthy of its attention.

If, moreover, it appears that no evidence was offered on the hearing of the habeas corpus proceedings, which was competent to show the facts necessary to the existence of any question, it is presumed that this Court will go no further.

The only evidence offered by the petitioner to contradict and avoid the return of the Marshal was the bill of exceptions in the original action, showing the stipulations, objections, etc., regarding the waiver of trial by jury. (Printed Record of said case, p. 18.) This bill of exceptions was offered as a mere document without testimony of any kind to support it. (Printed Record, p. 18.) It was admitted in evidence subject to the objections of the respondent that it was incompetent, immaterial and inadmissible. (Printed Record, p. 23.) There were also brought before the Court the record of the judgment in the original action, the findings of the Court, and the original writ of *capias ad satisfaciendum*.

The bill of exceptions thus introduced was not competent or material evidence, because the office of the bill of exceptions is only to preserve the evidence and other matters affecting the judgment of the trial court for review. Grant, for the purpose of illustration, that the stipulation entered in the case was not sufficient to waive a trial by jury. The relator, to have taken advantage of this, should have introduced testimony competent to show that fact. The proceeding by habeas corpus is not in review of the trial court, but is collateral. In the case sought

to be reviewed here, that bill of exceptions had no value as evidence.

In 2 Amer. and Eng. Ency. Law, 222, the office of a bill of exceptions as evidence is stated as follows:

"It is conclusive evidence as between the parties, "but in that particular suit only, of the facts stated "therein."

This precise contention upon the competency of the bill of exceptions was raised in habeas corpus proceedings in re Haskell, 52 Fed. Rep., 795.

Taft, J., says: "The failure of the State of Ohio "to prove the venue of the offense in Lucas County, "as alleged by the petitioner, can only appear from a "consideration of the bill of exceptions stating all "the evidence; but the bill of exceptions is not a "part of the record of a judgment into which a court "may look in a proceeding where the judgment is "collaterally attacked. It is only a part of the record "in direct proceedings on error for the examination "of a reviewing court, and can never be considered "in habeas corpus to test the validity of the judg-"ment."

The general definition of the purpose of a bill of exceptions make the use of it as a species of self-supporting and uncontrovertible evidence in collateral proceedings so absurd that further argument on this point is unnecessary. Without the bill of exceptions there is nothing in the record of the case sought to be reviewed avoiding or impeaching the return of the Marshal. The allegations of the unsworn pe-

tition are, as said in the matter of Mason, 8 Mich., 70, and Crowley vs. Christensen, 137 U. S., 86, supra, entirely insufficient, and cannot be considered as impairing the return.

Petitioner is seeking to escape imprisonment under the judgment on which the capias here involved was issued, by a motion to quash the writ and by writ of error upon denial thereof. That action was virtually a release of errors in the proceeding sought to be reviewed. Reference to that proceeding, though perhaps not proper, as nothing to show it has been incorporated in the record proper, may be pardoned, perhaps, as it appears in the opinion of the Circuit Court of Appeals in the proceeding sought to be reviewed (69 Fed., 987), and referred to in the petition.

VI.

THE QUESTIONS ULTIMATELY IN ISSUE ARE OF NO DOUBT WHATEVER, AND WERE RIGHTLY DECIDED BY THE CIRCUIT COURT OF APPEALS.

If a clear statement of the real aspect in which the questions of state laws and federal practice were originally raised in this case seems to be an argument on the merits rather than on this motion, it is because the mere statement of the questions evokes their proper answer without doubt or further discussion. As petitioner has filed herein a brief fully

discussing these questions, it is but proper and due to the Court that the contrary views should be fully stated, upon which the Circuit Court of Appeals acted. It is, of course, the unwaived contention of this objector that the record does not present these questions, which arose on the original case.

They are as follows:

Did the Act of Illinois of June 17, 1893, apply to the case of Stroheim vs. Deimel in the United States Circuit Court, in the Northern Division of the Northern District of Illinois, in which trial by jury had been waived in October, 1892, by stipulation duly executed by counsel and filed?

That case was duly at issue for the May term, 1890, of the Circuit Court, and was duly noticed for trial and placed on the trial calendar of that, and each succeeding term. It was continued seven times, and at each term on the motion of the defendants. Finally, at the October term, 1892, objections being pressed by the plaintiffs below to any further continuance, in consideration of the withdrawal of the objections, the plaintiffs in error, defendants below, agreed to waive a trial by jury, and made the stipulation waiving trial by jury.

As state statutes never apply ex proprio vigore to federal courts, this question resolved itself into the query as to whether the acts of Congress adopting state laws, process and procedure applied.

These are Sections 721, 914, 916, 990, and 991 of the Revised Statutes of the United States.

It is well settled that Section 721 does not apply to

prospective laws regulating the mode of procedure or issuance of process in the Federal Courts.

> Wayman vs. Southard, 10 Wheaton, 1.
> United States vs. Halstead, 10 Wheaton, 51.
> Lawrence vs. Wickware, 4 McLean, 56.

Counsel for petitioner does not attempt to claim any force for the Illinois statute under this section. As his whole contention is based only upon Sections 914, 990, and 991, those alone need be further considered.

A.

SECTIONS 990 AND 991 OF THE REVISED STATUTES.

In the petition for rehearing, attached to petitioner's brief, an extended argument is added to show that Congress has construed the words "imprisonment for debt," in Section 990, as embracing "imprisonment for fraud," and that that section covers the Act of Illinois of 1893.

Eight acts enacted between 1792 and 1824 are cited and considered by counsel for petitioner in the attempt to establish these propositions.

Whatever argument can be founded upon those acts has been presented by counsel for petitioner in an exhaustive manner, but the conclusion reached by him is, on its face, but one of two equally proper views of the meaning of the words "imprisoned for "debt," as contained in the title merely of those acts; for the body of the respective acts is equally suscep-

title of the construction that these acts extended only to actions ex contractu. There is absolutely no judicial or legislative construction of these statutes for "relief of persons imprisoned for debt," as to their scope.

The question to be determined, however, is not what Congress meant by these words in 1792, 1794, 1796, 1798, 1800, 1817, and 1824, when the "relief" granted to prisoners was such as might be deemed a humane duty to all imprisoned upon final process. The construction of Section 990 depends upon the meaning of the terms "imprisoned for debt" in December, 1873, when these words were adopted as part of Section 990. Between 1800 and 1873 there was a general abolition or amelioration of the conditions of imprisonment upon judgments in actions ex contractu, where no fraud had been perpetrated. State statutes and constitutions effected this humane modification, and Congress followed the movement in the acts of 1837, 1841, and 1867.

But while leniency was thus extended to the unfortunate debtor, there was no uncertain declaration by all the courts, that the fraudulent debtor could not claim the benefits of these acts for the benefit of the "honest but unlucky."

In this state this rule was announced in 1853 in People vs. Cotton, 14 Ill., 414, in which the Court says of the constitutional prohibition of imprisonment for debt:

"This prohibition applies only to actions for con-
"tracts, express or implied. It does not extend to
"actions for torts. The design is to relieve debtors

"from imprisonment, who are unable to perform their "engagements. They are exempt from arrest, if they "act in good faith to their creditors."

The rule was affirmed in practically the same language in 1862 in McKindley vs. Rising, 28 Ill., 337-343, and again asserted in January, 1867, in People vs. Greer, 43 Ill., 213. See also the rule as commented upon in Kennedy vs. People, 122 Ill., 649, where the Court says:

"We have held that the prohibition of the consti- "tution applies to actions upon contracts, express or "implied. Its design is to relieve debtors from im- "prisonment who are unable to perform their engage- "ments. They are exempt from arrest if they act "in good faith toward their creditors. The prohibi- "tion does not extend to actions for tort, nor to fines "or penalties arising from a violation of the penal "laws of this state. It has reference to debts arising "ex contractu." Citing cases.

In McCool vs. State, 23 Ind., 127, the same construction of the words "imprisonment for debt" was laid down in 1864.

Other instances might be given; but inasmuch as this same construction was placed upon these words in 1867 in U. S. vs. Walsh, 1 Abb. C. C., 66 (Fed. Case No. 16,635), and in April, 1871, in Hanson vs. Fowle, 1 Sawy., 497 (Fed. Case, No. 6,041), the meaning which Congress gave these words in December, 1873, cannot be doubted. In this last case Deady, J., says:

"Counsel for defendants also argued that an arrest "for an injury to the person was not allowed by the

"law of this state, and therefore this arrest was not "even within the authority of Admiralty Rule 48. "Of course, counsel admits that Sub. 1 of Section 106 "above cited provides for an arrest of the defendant "in an action for damages for an injury to the person, "but he contends that this provision of the section "is in conflict with Sub. 19 of Art. 1 of the constitu- "tion of the state, which declares: 'There shall be no "imprisonment for debt except in cases of fraud and "absconding creditors.'"

"In U. S. vs. Walsh, 1 Abb. C. C., 66, it was held "that this clause of the constitution should be con- "strued as if it read: 'There shall be no imprison- "'ment for debt arising upon contract, express or "'implied, except,' etc. In support of this conclusion "the court said:

"'General or abstract declarations in bills of rights "'are necessarily brief and comprehensive in their "'terms. When applied to the details of the varied "'affairs of life they must be construed with refer- "'ence to the causes which produce them and the end "'sought to be obtained.' A person who willfully "'injures another in person, property, or character, "'is liable therefor in damages. In some sense he "'may be called the debtor of the party injured, and "'the sum due for the injury a debt, but he is in fact a "'wrongdoer, a trespasser, and does not come within "'the reason of the rule which exempts an honest "'man from imprisonment, because he is pecuniarily "'unable to pay what he has promised. For instance, "'a person who wrongfully beats his neighbor, kills "'his ox or girdles his fruit trees, ought not to be

"'considered in the same category as an unfortunate "'debtor.' And this accords with the course of the "common law, which did not give process against "the body either before or after judgment, only in "actions for wrongs accomplished with force; it be-"ing a rule that in actions vi et armis a capias lay, "and when a capias lay in process, a capias ad satis-"faciendum lay after judgment.

"Afterward a capias was given in actions of ac-"count by the statute of Marlbridge, 52 Hen. III, "Ch. 23, and detinue by statute 25 Edw. III., Ch. 17, "in case by statute, 19 Hen. VII., Ch. 9," etc.

See also:

Ex parte Bergman, 18 Nev., 331, 342.
Harris vs. Bridgers, 57 Ga., 407.
McCool vs. State, 23 Ind., 131.
Long vs. McLean, 88 N. C., 4.
Lathrop vs. Swiger, 39 Barb., 396.
Cooley Const. Lim., 341, 4th Ed., 422.

As counsel for petitioner asserts (page 31 of the petition for rehearing), the execution in the original action was to reach the body of the judgment debtor, not his property. And the right to take his body arises from the nature of the judgment, it being one obtained in an action ex delicto. In Moore vs. Green, 73 N. Car., 394, it was contended, as petitioner contends, that imprisonment upon a judgment in tort is imprisonment for debt, because the imprisonment may be terminated or avoided by payment of the judgment. As well might it be said that imprison-

ment for non-payment of a fine, as in commitment for contempt, is imprisonment for debt.

In that case the court says:

"The argument is this: The moment a judgment "shall be obtained, the claim for damages is con- "verted into a debt; the person of the defendant is "thereupon liberated and his bail discharged. For "what purpose, then, require bail, who are to be dis- "charged at the first moment when their liability "can be of any value? It is an oppression to the de- "fendant, and of no possible benefit to the plaintiff. "Dellinger vs. Tweed, 66 N. Car., 206, is cited as the "authority for the proposition that the claim for "damages is converted into a debt, within the mean- "ing of the constitution, by the recovery of judgment. "Undoubtedly, for some purposes it is. An action of "debt may be maintained on it, and a fi. fa. may "issue on it. But to construe the above cited clause "of the bill of rights (abolishing imprisonment for "debt) as forbidding imprisonment for any cause of "action which, by judgment, would become a debt, "would make its prohibition extend to all cases, as "every action becomes a debt in one sense when a "judgment is recovered on it. Chitty, in his standard "work on pleading, divides all actions into two great "classes: those which arise ex contractu, and those "which arise ex delicto. No doubt the framers of "the constitution had this familiar classification in "mind, and in forbidding imprisonment for debt, they "referred rather to the cause of action as being ex "contractu, than to the form it would assume upon a "judgment. If they had meant to forbid imprison-

"ment in every civil action, they would have said so. "But by forbidding it for debt, they plainly imply "that it may be allowed in actions which are not for "debt. In forbidding imprisonment for debt, as pop- "ularly understood, viz.: for a cause of action arising "ex contractu, they responded to the general public "sentiment, but I know of no writer on the reform "of the law who has recommended the abolition of "punishment for trespassers and wrongdoers. Such "a provision might be humane to the injuring, but it "would not be so to the injured parties. It would "withdraw from the state its power to impose a whole- "some check on violence and wrong, and would tend "to license disorders and law breakings incompatible "with the peace and welfare of society."

It is the cause of action which authorizes the imprisonment. The judgment is but the judicial establishment of the existence of the cause of action as a fact. The remedies to enforce the judgment are those which are appropriate to the cause of action.

That both federal and state courts have uniformly held that the abolition of imprisonment in causes of action ex contractu does not affect the right or power to imprison in causes of action ex delicto cannot be doubted.

There are several cases cited by counsel for petitioner, on pages 20 and 21 of the petition for rehearing, upon the purpose and intent of the act of 1867, which became Section 990, in 1873.

The most emphasized is Cooper vs. Dungler, 4 McLean, 257. An examination of this and every other

case cited by petitioner shows that it and all the others are actions ex contractu.

There can be no doubt that there was a clear and general construction of the words "imprisonment for debt" prior to December, 1873, which excluded from their intent all cases of "imprisonment ex delicto, for fraud."

Such construction by the federal courts was, it must be presumed, adopted by Congress when it re-enacted in 1867 and 1873 the provisions as to "imprisonment for debt."

Endlich on Construction of Statutes, Section 367, says:

"The importance, in the construction of a statute, of "a comparison of the same with earlier statutes in "pari materia, has already been pointed out. A re- "course to such statutes, however, necessarily in- "volves a recourse to the construction placed upon "them by the courts, for such decisions become virtu- "ally a part of the law, and, aside from this considera- "tion, as the comparison of former acts in pari materia "proceeds upon and is justified and demanded by the "principle that the legislature cannot be presumed "ignorant of previous legislation, so a recourse to the "construction put by the courts upon words used in "such acts is based upon the reasonable assumption "that, where the legislature has reproduced language "upon which a case has been decided, it must have "known the interpretation put upon them in that "decision. * * * Therefore, when the words of "an old statute are either transcribed into, or by

"reference made a part of a new statute, this is under-
"stood to be done with the object of adopting any
"legal interpretation which has been put on them
"by the courts. Section 368 * * * In other
"words, the re-enactment of a statute which has
"received a judicial construction in the same, or sub-
"stantially the same, terms, amounts to a legislative
"adoption of such construction, whether such re-
"enactment is by way of an isolated and independent
"statute, of the incorporation of several former stat-
"utes into one, or of their incorporation in a code or
"revision of statutes. * * * Section 369. But
"the rule is not confined to statutes strictly in pari
"materia. Where terms and modes of expression are
"employed in a new statute which, at the time of its
"enactment, had acquired, by judicial construction,
"a definite meaning and application in a previous
"statute on the same subject, or on one analogous
"to it, they are generally supposed to be used in the
"same sense, and in the construction of the latter
"act regard should be had to the known and estab-
"lished interpretation of such terms and modes of
"expression in the former."

See Reiche vs. Smythe, 13 Wall., 162, 165.
Vane vs. Newcombe, 132 U. S., 220-235.
Stout vs. Board of Commissioners, 107 Ind., 343-348.
U. S. vs. Mooney, 116 U. S., 104-106.

But even if the judicial and legislative construction of the words "imprisonment for debt" was not thus the very opposite of petitioner's contention, the force universally given to acts of Congress adopting State

statutes forbids the application of Section 990 to the Act of 1893 of Illinois. The Act of 1893 was passed twenty years after Section 990 was adopted, and therefore is not within Section 990.

It has been very much doubted if Congress has the power to adopt prospective State legislation.

U. S. vs. Walsh, 1 Abb. C. C., 66, 70.
In re Freeman, 2 Curt., 491-9.
Federal Case, No. 5,083.

In any case the presumption must be against the intent to adopt prospective legislation of the independent State governments.

But in respect to Section 990, a careful reading of it in the light of judicial history and established interpretation makes it clear that it is prospective only as to absolute abolition of imprisonment for debt.

A comparison of the Acts of 1839, 1841, and 1867, with Section 990, is very instructive on this point:

Section 990 is as follows:

"Sec. 990. No person "shall be imprisoned for "debt in any State on "process issuing from a "court of the United "States where by the laws "of such State, imprison-"ment for debt has been "or shall be abolished. "And all modifications, "conditions and restric-"tions upon imprison-"ment for debt provided "by the laws of any State "shall be applicable to

The Act of 1839 is as follows:

"That no person shall "be imprisoned for debt "in any State on process "issuing out of a court of "the United States where "by the laws of the State "imprisonment for debt "has been abolished, and "where by the laws of a "State imprisonment for "debt shall be allowed un-"der certain conditions "and restrictions, the "same conditions and re-

"the process issuing from "the courts of the United "States to be executed "therein; and the same "course of proceedings "shall be adopted therein "as may be adopted in the "courts of such State."

"strictions shall be appli- "cable to the process issu- "ing out of the courts of "the United States; and "the same proceedings "shall be had therein as "are adopted in the courts "of such State."

The Act of 1841 is as follows:

"That the act entitled "'An Act to Abolish Im- 'prisonment for Debt in "'Certain Cases,' ap- "proved February twen- "ty-eight, eighteen hun- "dred and thirty-nine, "shall be so construed as "to abolish imprisonment "for debt, on process is- "suing out of any court of "the United States, where "by the laws of the State "in which said court shall "be held, imprisonment "for debt has been, or "shall hereafter be abol- "ished."

The very significant words of Section 990 in the Act of 1867, are as follows:

"And all modifications, conditions and restrictions "upon imprisonment for debt now (i. e., in 1867) exist- "ing by the laws of any State, shall be applicable to "process issuing out of the courts of the United States "therein, etc." * * *

The comparison of these acts shows that modifications, conditions and restrictions upon imprisonment

for debt by the State legislatures, are adopted only as they were in force in 1872. Only an absolute abolition of imprisonment for debt by a State, subsequent to the passage of the Revised Statutes, is prospectively adopted.

In Hanson vs. Fowle, 1 Sawy., 497, Fed. Case No. 6,041, the Court says of the Act of 1867:

"The middle clause which adopts the State law con-
"cerning 'modifications, conditions and restrictions
" 'upon imprisonment for debt,' was called for or sug-
"gested, at least as to the conditions and restrictions
"by the well-known fact, that the Acts of 1839 and
"1841, to which it is supposed this is supplementary,
"had in this respect been construed to be not pros-
"pective. Since the date of the first of these acts,
"serious changes have been made on the subject in
"the States then in the Union, while as to the States
"since admitted, they did not apply at all. If the
"phrase 'modifications upon imprisonment' is con-
"strued to be something more than cumulative upon
"the terms 'conditions and restrictions' immediately
"following, and to have a distinct and independent
"operation in regard to the subject—'imprisonment
" 'for debt,' then it was probably inserted in the act to
"meet and obviate the construction given to the Acts
"of 1839 and 1841, in Catherwood vs. Gapete and In
"re Freeman, where it was held that these acts did
"not adopt a law (then existing) of the State, which,
"instead of abolishing imprisonment for debt, only
"modified it and allowed it in certain cases."

In re Freeman, 2 Curtis, 491, Fed. Case No. 5,083, the Court says, of prospective State laws.

"Another view must here be adverted to, which "bears directly on the main question we are now con- "sidering. It is thus expressed by Mr. Justice Story "in U. S. vs. Knight, 3 Sumn., 358, Fed. Case No. "15,539:

" 'Hitherto the judicial construction of the acts of " 'Congress, which have adopted State laws, touching " 'writs and processes, and the proceedings thereon, " 'has uniformly been that they applied to the State " 'laws then in force. To this effect are the decisions " 'in Wayman vs. Southard, 10 Wheat., 4; Bank of " 'U. S. vs. Halstead, Id., 51, and Beers vs. Haughton, " '9 Pet., 329. I must confess that I entertain very " 'serious doubts whether Congress does possess a " 'constitutional authority to adopt, prospectively, " 'State legislation on any given subject. For that, " 'it seems to me, would amount to a delegation of its " 'own legislative power, and I think my doubts " 'strengthened by what fell from the Supreme Court " 'in Wayman vs. Southard (supra), and Bank of U. " 'S. vs. Halsted (supra). At all events, I should not " 'be disposed to give such construction to any act of " 'Congress, unless it positively required it by its " 'words and its intent.' See, also, Board of Wardens " 'of Philadelphia vs. Cooley, 12 How., 299.'

"Whether the last clause of the Act of February 28, "1839, by its language and its intent, does positively "require such a construction as would amount to an "adoption prospectively of the legislation of the "States, modifying their laws concerning imprison-

"ment for debt, is the question to be here decided. "Looking at the language of the act, it will be found "that, construed grammatically, a part of it points to "laws of the State thereafter to exist, whether passed "before the act of Congress or not, and a part of it "points solely to the then existing proceedings under "those State laws. * * * The next Congress had "its attention called to the question of the construc- "tion of this act; and as already stated, by the Act of "January 14, 1841, they enacted that this act should "be construed to abolish imprisonment for debt, "where, by the laws of the State, 'it has been or shall "'hereafter be abolished.'

"They are silent concerning the other parts of the "act, which provides for modifications of such im- "prisonment. We think this silence has a strong "tendency to show that it was not intended to adopt, "prospectively, the state laws on this subject.

"Considering the doubts to which the language of "the act in question was calculated to give rise—con- "sidering, also, that such prospective adoption of state "legislation was a clear departure from the settled "course of congress on this subject—we can hardly "doubt, that if it had been the intention of congress to "apply this new principle of legislation to the case of "subsequent modifications of the state laws concern- "ing imprisonment, having the subject directly before "them, they would have so declared, with the same "clearness as they do in respect to future state laws "for its abolition. Nor should it be lost sight of, that "it is, practically, a very different matter, to adopt "prospectively, state legislation concerning the aboli-

"tion, or that concerning the modification of imprison-
"ment for debt. It may be assumed, with some de-
"gree of safety, that if a state really and entirely abol-
"ishes imprisonment for debt, the process of the courts
"of the United States will be as effectual as the pro-
"cess of the courts of the states. Not so if the right of
"the creditor is modified and restricted, for it may well
"be, and is so in this case, that these modifications and
"restrictions will be accompanied with sanctions and
"safeguards which the courts of the United States are
"incompetent to apply."

Inasmuch as this last case was decided in March, 1871, its effect upon the construction of section 990 adopted in December, 1873, seems conclusive, under the rule of statutory construction above quoted.

See, also,

Campbell vs. Hadley, 1 Sprague, 470; Fed. Case No. 2,358.

U. S. vs. Tetlow, 2 Lowell, 159, 160; Fed. Case No. 16,456.

In U. S. vs. Walsh, 1 Abb. C. C., 66, in July, 1867, the Court says:

"But the act of 1841 is silent concerning the future
"laws of the states imposing restrictions and condi-
"tions upon the allowance of imprisonment for debt.
"It does not purport to adopt them."

From the comparison above made it will be seen that as far as touches prospective effect the statutes of 1839, 1841 and 1867 thus construed are identical with the words of section 990. There can be no doubt

then as to the construction of section 990. It is prospective only as to absolute abolition of imprisonment for debt.

Even the word "all," on which counsel for petitioner relies (petition, page 24), was in the act of 1867, and corresponds with the use of the word "same" in the act of 1839 (ubi supra).

The only prospective effect then of section 900 is in the words, "or shall be abolished."

It has been repeatedly held that a mere condition or restriction upon imprisonment such as is this act of Illinois of 1893 is not an abolition.

> Hanson vs. Fowle, 1 Sawyer C. C., 497; 503.
> Campbell vs. Hadley, 1 Sprague, 470.
> In re Freeman, 2 Curtis C. C., 491.
> Catherwood vs. Gapete, 2 Curtis C. C., 94.
> Lamaster vs. Keeler, 123 U. S., 376.

There is no possible ground for the contention that section 990, even if it adopts state laws affecting imprisonment upon judgments ex delicto, adopts any state statute enacted subsequent to December, 1873, unless they absolutely abolish imprisonment on such judgments.

Inasmuch as the authorities cited were nearly all decided prior to 1873, it is seen that the question as to section 990 is undoubtedly settled by legislative adoption of the rules stated. The question need not therefore be further argued before this Court.

SECTION 991.

Section 991 has nothing to do with the question under discussion as is shown by the judicial interpretation of Hanson vs. Fowle, 1 Sawyer, 497, Fed. Case No. 6,041, in 1871, of the corresponding part of the act of 1867. In discussing what was covered by the provisions as to imprisonment for debt the Court says of the provisions for procedure now constituting section 991:

"The first half of the act has no application to the "question before the court in any view of the subject. "It only regulates—by adopting the law of the state "upon the subject—the discharge of persons already "imprisoned for any cause, on process issuing out of "the national courts. For instance, by the law of this "state a person imprisoned on execution—after judg- "ment—ten days, may be finally discharged from such "imprisonment if he makes it appear that he has no "property liable to execution."

Following this decision the revisers very properly divided the act of 1867 into sections 990 and 991, as it treated of two separate matters. And congress in adopting the revised statutes adopted the above construction of the separate nature of the several provisions of sections 990 and 991 as pointed out in Hanson vs. Fowle.

As section 991 refers only to those already lawfully under arrest, the use of the words "any person * * * imprisoned * * * on * * * execution" cannot be supposed to enlarge or diminish the classes

subject to arrest or the causes for which imprisonment may have been imposed.

Counsel exaggerate the importance of the issues involved by assuming that it is contended that the length of time during which petitioner may be detained and the manner of his discharge are not controlled by the laws of Illinois. These are probably made applicable by section 991, but that question has not yet arisen in this litigation.

B.

SECTION 914 OF THE REVISED STATUTES.

This section, formerly section 5, act June 1, 1872, 17 Stat., 197, is as follows:

"The practice, pleadings, and forms and modes of "proceeding in civil causes, other than equity and ad- "miralty causes, in the Circuit and Districts Courts, "shall conform, as near as may be to the practice, "pleadings, and forms and modes of proceedings ex- "isting at the time in like causes in the courts of rec- "ord of the state within which such Circuit or District "Courts are held, any rule of court to the contrary not- "withstanding."

The general rules of construction which have been applied to this section, make it inapplicable to the case at bar.

Section 914 adopts state practice and procedure only as far as practicable, and as far as the same are

suited to the attainment of justice in the Federal courts.

Nudd vs. Burrows, 91 U. S., 425, 441.
Railroad Co. vs. Horst, 93 U. S., 291, 301.
Lamaster vs. Keeler, 123 U. S., 376, 388.
Phelps vs. Oaks, 117 U. S., 236.

The determination of the applicability of the state laws in each case rests in the discretion of the Court and upon the facts of each case.

Hat Sweat Mfg. Co. vs. Davis Sewing Machine Co., 31 Fed., 294-296.
Lowry vs. Story, 31 Fed., 769.
In re Chateaugay Ore & Iron Co., 128 U. S., 544.
Palmer vs. Allen, 7 Cranch., 550.
In re Freeman, 2 Curtis, 491; Fed. Cases, 5083.

Where congress has legislated upon a mode of procedure, or the effect to be given certain acts, or upon some general matter of practice, this legislation is exclusive of all interference of state laws or statutes, whether inconsistent or not.

Ex parte Fisk, 113 U. S., 713.
Parsons vs. Redford, 3 Pet., 433.
McNutt vs. Bland, 2 How., 9-17.
Nudd vs. Burrows, 91 U. S., 425, 441.
Dwight vs. Merrett, 4 Fed., 614.
Easton vs. Hodges, 7 Biss., 324; Fed. Cases, 4258.

The injustice and retroactive effect of the Illinois statute of 1893, if applied to this case are evident.

That congress has fully legislated upon the subject-matter of that act is beyond doubt.

From the analysis of the Illinois statute of 1893, it has been shown that that act has one or all of the following effects, and no more:

1. It is a regulation of the mode of the trial of issues involving facts which may sustain a judgment on which a ca. sa. may issue.

2. It limits the effect of the finding of such facts by a court without a jury.

3. It prescribes the method of waiving trial by jury.

4. It restricts the right to issue an execution against the body.

Congress has legislated as to the mode of trial of all issues at law, as to the effect of the finding of facts by a judge without a jury in all cases, and has fully regulated the method of waiving trial by jury in the following provisions:

Secs. 648, of the Revised Statutes (Act Sept. 24, 1789, c. 20, 512, Vol. 1, p. 79; Act March 3, 1865, ch. 86, s. 4, v. 13, p. 501):

"The trial of issues of fact in the Circuit Courts shall "be by jury, except in cases of equity and of admiralty "and maritime jurisdiction, and except as otherwise "provided in proceedings in bankruptcy, and by the "next section."

Sec. 649, (Act March 3, 1865, ch. 86, sec. 4, Vol. 13, p. 501):

"Issues of fact in civil cases in any Circuit Court "may be tried and determined by the court, without "the intervention of a jury, whenever the parties, or "their attorneys of record file with the clerk a stipula- "tion in writing waiving a jury. The finding of the "court upon the facts, which may be either general or "special, shall have the same effect as the verdict of a "jury."

There must be a jury trial, unless the parties or their attorneys file a stipulation, etc.

The Illinois statute, if its meaning be as petitioner contends, clearly conflicts with the United States statute, and therefore the latter governs and the Illinois statute does not apply. It requires in certain cases a certain formal execution of the waiver of a trial by jury, but congress permits such waiver in all cases upon the stipulation of the parties or their attorneys.

The United States statute declares that in all cases submitted to the court in accordance with section 659 the finding of the court "shall have the same effect as the verdict of a jury." The statute of Illinois provides that the finding of the court shall not have the same effect as the verdict of a jury unless the waiver of a jury is executed in a special manner. The statute of Illinois differentiates between the finding of the court and a finding by a jury, but congress enjoins that in all cases the finding of the court shall be given the same effect as the finding by a jury.

Section 649 was not passed merely as a means of securing an appeal where the trial was by the Court

without a jury, as counsel for petitioner contends, but as an exception to Section 648, as therein shown. Section 700 gives the right of appeal.

Section 649 makes the finding of the Court generally have the same effect as the verdict of a jury.

On appeal it has been construed as bringing such finding by the Court within the restrictions on review of questions of fact tried by a jury, so that, in reality, it lessens rather than increases the power of the reviewing court, given by Section 700.

Miller vs. Life Insurance Co., 12 Wall., 285, 300.
City of Key West vs. Baer, 66 Fed., 440.

Counsel for petitioner admits that if a statute of Illinois prohibited the trial of issues of facts in actions ex delicto in any other manner than by jury, it would be inapplicable and conflicting. It is clear that the power of a state to put a condition on trial without a jury in a Federal Court must be as fully restricted as its power to forbid a trial without a jury. If congress has not adopted state statutes which forbid, it has not adopted state statutes which restrict trial without a jury.

The conclusion cannot be escaped that, because Congress has legislated upon the manner of waiving a trial by jury, and upon the effect of the finding by the judge, Section 914 does not adopt any statute of Illinois on those subjects.

But it is contended that the statute of 1893 governs

the issuance of writs against the body, and the whole of the petition for rehearing considers it only in that light. The petition argues that inasmuch as Section 916 refers only to writs against the property of the debtor, Congress has not legislated on the subject of writs against the body adversely to the statute of 1893, and that in the absence of such adverse legislation Section 914 makes the statute of 1893 applicable to the Federal Courts sitting in Illinois.

The contention that the change in the common law of Illinois made by the statute of Illinois, governs the Federal Courts in that state, not only is contrary to the rule that the statutes of a state do not ex proprio vigore have any operation on the powers and proceedings of the Federal Courts, but, being based on Section 914, runs counter to the construction uniformly given to that section.

To hold that it applies to the power and right of the Federal Courts in Illinois to issue a ca. sa., would be giving a different effect in that state to the finding of a Court than would be given to the finding of a jury; for the limitation of the Illinois statute is based only on the method in which the facts in issue are determined.

The narrow view of petitioner confines the petition for rehearing to the consideration of the statute of Illinois treated only as a regulation of the issuance of writs against the body. But it cannot be so considered. Its general effect must be borne in mind.

Besides this construction of Section 914 which forbids such interference with the effect Congress has given to the finding of the Court without a jury, is the

construction that has been put on Section 916 of the Revised Statutes.

Counsel for petitioner erroneously asserts that, because Section 916 does not include state regulations as to executions against the body, it is not pertinent to the question of the inclusion of such executions in Section 914. But in this assertion the express holding of Lamaster vs. Keeler, 123 U. S., 376, is overlooked. In that case this Court says:

"It matters not that the remedies designated in "Sec. 916 are stated to be, to reach by execution or "otherwise the property of the judgment debtor, and "that proceedings under the stay law of Nebraska "are only to secure, where a stay is obtained, the "personal liability of the sureties for the amount of "the judgment—in the absence of a designation of "any other remedies the section is a declaration that, "until adopted by a rule of the court, no other reme-"dies prescribed by state laws shall be permitted in "the Federal Courts. The extent to which the Federal "Courts may go, in the enforcement of judgments, by "resort to remedies provided by state laws in similar "cases, is thus defined and limited."

That is to say, the Court applied the maxim, "Inclusio unius exclusio alterius est."

Section 914 does not extend to remedies on judgments. It does not apply to such remedies even as to matters of procedure, because those are governed by Sections 916 and 991.

For the power and right to issue the writ of capias

ad satisfaciendum, and not its execution, is affected by the statute of Illinois of 1893.

The case of Bank of United States vs. January, 10 Wheaton, 66, note, is conclusive that the power of the Federal Courts to issue the writ is measured by the common law governing its issuance when Illinois became a state.

The various provisions of a general act which provide a complete system of procedure, are exclusive of and operate to repeal or reject local and special acts on the same subject matter.

Congress has legislated generally upon the subject of waiving trial by jury, the effect of the finding by the judge alone, and the manner and scope of appeal. It has established general regulations whose evident intent was to furnish an exclusive and uniform rule. This being so, there is no place in Federal practice for such statutes as the Act of Illinois of 1893. Such has been the general principle underlying the various cases above cited in the construction of Sections 914 and 916. It is an elementary rule.

> Endlich Interpretation of Statutes, Sections 231, 232.
>
> City of Cairo vs. Bross, 101 Ill., 475.

There can be no doubt that Section 914 does not control the right to issue writs against the body, as contended by petitioner, even if it governs the manner of the execution of such writs.

The right to the writ depends upon the power of the Court to issue it, and that it must be conceded is covered by Section 716 of the Revised Statutes. This

was Section 14 of the Judiciary Act of 1789, and is construed in Wayman vs. Southard, 10 Wheaton, 1, 22, as giving the Federal Courts power to issue writs of execution.

As Congress has thus legislated on the power, only the manner or mode of proceeding upon the power follows state laws, under Sections 916 and 991. This Court has expressly decided that where the limitation by the state statute upon the mode of proceeding was such as to amount to a limitation of the power of the Federal Courts to execute their judgments the state statutes did not apply.

Palmer vs. Allen, 7 Cranch., 550.
Bank vs. Tyler, 4 Pet., 366.
Duncan vs. Darst, 1 How., 301.
Boyle vs. Zacharie, 6 Pet., 648.

These cases are all reviewed in In re Freeman, 2 Curt., 491, 9 Fed. Cases, 5083.

There are numerous other cases holding that in spite of the various conformity acts, the right to imprison for tort or for debt was not affected thereby, but depended upon the Acts of 1839, 1841 and 1867, now Sections 990 and 991 of the Revised Statutes.

In re Freeman, 2 Curtis C. C., 491; 9 Fed. Cases, 5083.
Campbell vs. Hadley, 1 Sprague, 470; Fed. Cases, 2358.
U. S. vs. Tetlow, 2 Lowell, 159, 160
U. S. vs. Walsh, 1 Abb. C. C., 69.
Hanson vs. Towle, 1 Sawyer C. C., 497, 503; Fed. Cases, 6041.
Catherwood vs. Gapete, 3 Curtis C. C., 94; Fed. Cases, 2513.

If for a period of nearly seventy years the Federal Courts issued executions against the body in actions for debt regardless of the various state provisions, except as adopted in the Acts of 1837, 1841 and 1867, and during all that period never suggested that the regulation of "the forms and modes of proceeding" under the Acts of Sept. 28, 1789 (Sec. 2), and of May 8, 1792 (Sec. 2), and their successors, was a regulation of the right to proceed, it must be concluded that no such construction as petitioner contends for was given those words by the courts or by Congress, and when Congress used the same words in the fifth section of the Act of June 1, 1872, now Sec. 914, it used them in the sense and under the same construction so long put upon them.

Endlich on Statutory Construction, Sec. 367, supra, and authorities supra.

To construe the terms "modes of proceedings," therefore, in the 914th section of the Revised Statutes, to mean that that section makes all the state statutes which limit or regulate imprisonment on an execution against the body applicable to, and in force in, the respective Federal courts sitting in the respective states, does violence to the opposite construction put upon those words by the courts and by Congress.

Counsel rely upon an obscure dictum in the nisi prius decision in Low vs. Durfee, 5 Fed., 256, decided in 1880, for the contention that Section 914 governs remedies on judgments. Low vs. Durfee was an action ex contractu governed by Section 916, and the

914 in the opinion is a misprint or a blunder. If the dictum is as counsel construes it, Low vs. Durfee is squarely in conflict with Lamaster vs. Keeler, 123 U. S., 376, decided in 1887. Counsel unsuccessfully attempts to distinguish this case on page 31 of the petition for rehearing.

While counsel is right in saying that a ca. sa. which is issued in an action *ex delicto* seeks to reach in punishment the body of the fraudulent or tortious debtor rather than accomplish satisfaction of a mere debt out of his property, counsel errs in asserting that in Lamaster vs. Keeler the action was an attempt to reach the property of the debtor. As already shown the effort in Lamaster vs. Keeler was to reach the liability of a surety on an alleged stay bond by an execution authorized by a state statute, and this Court held that Section 916 excluded all remedies on judgments not authorized by its terms.

The fact that Section 916 is not prospective in its effect, and that Lamaster vs. Keeler shows one of many examples of non-uniformity, is suggestive of the fatal weakness of the argument upon the supposed effort of Congress to obtain uniformity, with which counsel concludes the petition for rehearing on pages 37 to 47.

Congress does not intend and never intended that the Federal courts should be in all or in many, or even a few, respects governed in their procedure on writs, and much less in their powers to issue them by the changing whims and experiments of different state legislatures.

If Congress had so intended, Section 914 would have accomplished its ends.

Section 916 is clear evidence of an intention to withdraw final process from the general rule of Section 914, as to uniformity.

The length of the discussion of the questions involved is due rather to their number, and an attempt to reply specifically to each contention made in the brief filed by petitioner herein, than to any difficulty or doubt which the questions involve. It does not seem that upon any possible ground there is probable or even possible error in the decision of the Circuit Court of Appeals which was adhered to upon a petition for rehearing.

It is respectfully submitted that, in the first instance the case sought to be reviewed does not fall within the classes reviewable by certiorari in this court, and further, that no question of sufficient doubt or importance is involved to call for the consideration of this court or to further delay the termination of the litigation involved.

Respectfully submitted.

L. MAYER,
Attorney for Respondent.

John W. Arnold, Marshal.

Office Supreme Court U. S.
FILED.
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JAMES H. McKENNEY,
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IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1895.

No. 913.

UNITED STATES ex rel. RUDOLPH DEIMEL
vs.
JOHN W. ARNOLD, United States Marshal for the Northern District of Illinois.

Application for *Certiorari* to Circuit Court of Appeals for the Seventh District.

Brief in Reply for Petitioner.

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BRIEF IN REPLY FOR PETITIONER.

MAY IT PLEASE THE COURT:

In reply to the argument filed herein on behalf of the respondent, we shall content ourselves with a brief discussion of the following questions:

First. Does the Illinois statute of 1893 require that the waiver in writing therein provided for shall be executed by the defendant personally?

Second. Does the record in the case at bar show that the defendants did not personally execute a waiver in writing?

I.

DOES THE ILLINOIS STATUTE OF 1893 REQUIRE THAT THE WAIVER IN WRITING THEREIN PROVIDED FOR SHALL BE EXECUTED BY THE DEFENDANT PERSONALLY?

Admitting, as we do, that in nearly all matters relating to the trial and disposition of a cause, an attorney has power to represent his client and that the client is bound by stipulations entered into by the attorney which concern the remedy or method of procedure only, we insist that the application of that rule to the case at bar would defeat that which, it is apparent, was the evident intention of the legislature, and that was, that no defendant should be imprisoned for non-payment of a judgment in any civil action rendered without a trial by jury *unless the waiver of such mode of trial had first been called to his attention and expressly sanctioned by his own signature.*

The language of the act in question would seem to be too plain to admit of serious controversy with respect to its meaning. By taking it to mean what it plainly says, it appears that a waiver of a trial by jury to justify imprisonment for non-payment of a judgment must be evidenced by a formal waiver in writing executed by the *defendant*, or *defendants*. The statute does not say this waiver may be executed by the *attorneys* of the defendant or defendants, and there is no known rule governing the construction of statutes that will permit the interpolation of the additional words necessary to give it such a meaning.

The intention of the legislature to require the execution by the defendant or defendants personally of a

formal waiver in writing of a jury trial, as a condition precedent to imprisonment for non-payment of a judgment, is manifest not only from the nature of the act itself, but also from the previous statutes in force at the time the act of June 17, 1893, was passed.

The Illinois Practice Act of 1874 (Ch. 110, R. S. 1874) contains the following provisions:

"Sec. 41. In all cases in any court of record of this "state, *if both parties shall agree*, both matters of law "and fact may be tried by the court * * *

"Sec. 60. Exceptions taken to the decisions of the "court, upon the trial of causes in which the parties "agree that both matters of law and fact may be tried "by the court, and in appeal cases, tried by the court "without the intervention of a jury, shall be deemed and "held to have been properly taken and allowed, and the "party excepting may assign for the error, before the Su-"preme court, any decision so excepted to, whether "such exception relates to receiving improper, or re-"jecting proper testimony, or to the final judgment of "the court upon the law and the evidence.

(The two foregoing sections are substantially the same as sections 11 and 22 of chapter 83, R. S. 1845.)

Prior to the Act of June 17, 1893, therefore, the parties could waive a trial by jury in a common law action, by agreement evidenced in any manner the court might deem sufficient for the purpose of expressing the assent to the waiver of the common law mode of trial. The agreement could be made either by the parties themselves, or in their behalf by their attorneys. It could be made orally or in writing.

What, then, could have been the purpose of the legis-

lature in passing the act of 1893, unless it was to require a personal waiver in writing by the defendants to authorize imprisonment as a means of collecting the judgment? Unless the attention of the defendant personally was to be called to his waiver of his right of trial by jury, it would seem that the statute could serve no useful purpose, and that a waiver made in accordance with the statute theretofore in force would have been regarded as amply sufficient.

It is true, as a general rule, as said by the court in *Wilson* v. *Spring*, 64 Ill., 14, that "an attorney re-"tained in a case may, on the trial, make admissions "and waive rights of his client, which will be as binding "as if made by himself." But this general rule of the common law cannot be held to nullify an express statute which, by its very terms, requires the execution by the party himself of a written instrument in order that a judgment may warrant his imprisonment. Although in the absence of a statute governing the question an attorney by agreement, either written or oral, may, in a civil case, waive a trial by jury or any other right which relates merely to the remedy, yet where a statute in express terms, declares that a waiver of a jury trial, to justify imprisonment of the defendant for non-payment of a judgment, must be evidenced by an instrument in writing executed by the *defendant*, the contention that this plain language must yield to the common law rule referred to so as to authorize the instrument to be executed by the defendants' attorney, would seem to be without any foundation in reason or authority.

Such a statute is plainly one enacted to restrict and limit the power of the court to inflict imprisonment upon a defendant, and the restriction and limitation thus im-

posed should not be frittered away by a construction that renders the enactment of the statute an absurd and useless act upon the part of the legislature.

But there is another reason why the stipulation signed by the attorneys of the parties, even were it conceded that a stipulation signed by the attorneys would be in compliance with the Act of 1893, cannot be held to be such a waiver as is made by that act a condition precedent to the imprisonment of the defendant. By reference to the stipulation (Pr. Rec., 19), it will be perceived that the waiver of a trial by jury was expressly coupled with the stipulation that the cause should be tried by Judge *Grosscup*. And it further appears from the bill of exceptions signed by Judge Bunn (Pr. Rec., 7–11) that the trial before him was had, not in pursuance of any written stipulation, but because of the oral consent of the defendants' attorneys.

We have never heard any reason alleged why it is not competent for the parties, by their stipulation, to provide as a condition to the waiver of a trial by jury, that the cause shall be tried before a particular judge. The parties are not bound to enter into any stipulation at all in reference to the matter, but if they do, a condition thus voluntarily made by them should be held binding. If we are correct in this, it follows that there was no stipulation in writing of any kind authorizing a trial before Judge Bunn, and that the trial had before him was solely in pursuance of the oral consent of the defendants' counsel.

Counsel for the respondent seem to regard it as very clear that the Circuit Court of Appeals ought to have based its judgment on the ground that the stipulation under consideration signed by

the attorneys was a compliance with the Illinois statute, and that this court ought to so hold, and on that ground deny this application. To this we can only say that it seems very clear that such a ruling could not be founded either upon reason or authority, and that this court ought to base its decision allowing or denying this application solely upon the view it may take as to the importance of the point actually decided by the Circuit Court of Appeals instead of upon its view as to the importance of some point that the Circuit Court of Appeals might have decided, but did not in fact decide, in favor of respondent, and which, furthermore, it could not have so decided without committing manifest error.

II.

DOES THE RECORD IN THE CASE AT BAR SHOW THAT THE DEFENDANTS DID NOT PERSONALLY EXECUTE A WAIVER IN WRITING?

From the language of the act of June 17, 1893, referred to, it follows as a necessary consequence that a plaintiff who claims the right to imprison the defendant for non-payment of a judgment in a civil suit must show affirmatively either that such judgment was rendered upon the verdict of a jury, or that the defendant waived a jury trial by executing a formal waiver in writing. This record, we respectfully insist, not only contains no verdict of a jury to support the judgment, but it also fails to show that the defendants executed a formal waiver in writing of a trial by jury.

1. The judgment entry of July 23, 1894, contains the following recital:

"On *the* stipulation in writing of all the parties hereto "heretofore duly filed herein *by the attorneys of record* "*for the parties to this suit* with the clerk of this court, "this cause is submitted to the court for trial without "the intervention of a jury."

It is contended on behalf of the plaintiffs that this recital is conclusive proof that the defendants did "waive "a jury trial by executing a formal waiver in writing." This contention, however, it seems to us, is not well founded.

If the recital in the record, when reasonably construed, will bear the construction that the stipulation was executed by the attorneys for the parties and not by the parties themselves, or, indeed, if the language of the recital is not clearly incapable of the construction that the stipulation was made by the attorneys, it is not a sufficient basis for the imprisonment of the defendants. As the statute requires that it should affirmatively appear that the waiver in writing was executed by the defendants themselves, they cannot be deprived of their liberty if the recital leave it doubtful whether the stipulation was executed by the parties themselves or by their attorneys.

In the absence of any statutory provision on the subject, a stipulation in writing by the attorneys of the respective parties in reference to any matter connected with the mode of procedure in a suit would, in law, be properly termed a stipulation of the parties. The attorneys of the parties being authorized by the very nature of their employment to enter into stipulations on behalf of their clients respecting the mode of trial, excepting as may be otherwise provided by statute, all such stipulations are, in legal effect, stipulations of the parties. The recital in the judgment entry, therefore, is entirely con-

sistent with the idea that the stipulation referred to was one executed in the name of the parties by their attorneys, and was not one executed by the defendants personally, and for this reason it must be held that the record does not show affirmatively that the defendants personally executed a formal waiver in writing of a trial by jury. Indeed, if there had been a waiver in writing executed by the defendants personally, it must be presumed the clerk would have so recited the fact in the judgment entry, and that he would not have used language consistent with the idea that there was a stipulation in writing signed by the attorneys on behalf of the defendants.

2. As section 649 of the Revised Statutes of the United States provides that issues of fact in civil cases in any Circuit court may be tried and determined by the court without the intervention of a jury "whenever the "*parties* or *their attorneys of record file* with the clerk "a stipulation in writing waiving a jury," it is fairly to be inferred from the recital above referred to, contained in the judgment entry of July 23, 1894, that the stipulation was one made by the attorneys of record, and not by the parties themselves. Any other construction of the language of the recital would give no effect to the statement that the stipulation was "duly *filed* herein by the "*attorneys of record* for the parties." It is a fair inference from the language used, that the stipulation was one for the purpose of complying with section 649 above referred to, and not one made for the purpose of a formal waiver by the defendants themselves of a trial by jury, and that it was *signed* as well as *filed* by the attorneys, and not by the parties.

3. The judgment entry referred to recites that the case was submitted to the court for trial on "*the* stipula-

"tion in writing of all the parties hereto *heretofore duly* "*filed herein* by the attorneys of record." This recital necessarily incorporates into the judgment entry, by reference, the stipulation on file, and makes it a part of the record. Had the judgment entry recited that the cause had been submitted to the court for trial upon "*a* stipu- "lation in writing of all the parties," etc., it is possible it might be presumed there was another stipulation than the one found on file; but the stipulation referred to was "*the* stipulation * * * heretofore duly filed herein," and hence the inference that there was any other stipulation than the one found on file is effectually excluded. But, regardless of the recital, the stipulation would in any event be regarded as a part of the record, and as the best evidence of the manner in which the trial by jury was waived.

Kearney v. *Case*, 12 Wallace, 275.

The stipulation itself shows that it was filed January 9, 1893, and was signed by the attorneys of the parties, and not by the parties personally, and thereby it is affirmatively shown that there was no execution by the defendants personally of a waiver in writing, but that the cause was submitted to the court upon a stipulation signed by the attorneys, and not by the parties themselves. Besides it shows that the stipulation provided for a trial before Judge GROSSCUP, whereas the trial was had before Judge BUNN, in pursuance, not of a stipulation in writing, but of an oral consent of the attorneys of the defendants.

4. The bill of exceptions shows that the stipulations signed by the attorneys of the parties and filed January 9, 1893, was the only stipulation in writing filed in said cause for the submission of the cause for trial without a jury.

The bill of exceptions is not only a part of the record, but it is the controlling part as to the facts it recites.

In *Hirth* v. *Lynch*, 96 Ill., 409, the court say:

"Where the recitals of the record of proceedings, as "made up by the clerk, and the statements of a bill of "exceptions duly signed and sealed by the judge, are "not in harmony, we must take the real truth to be as "stated in the bill of exceptions."

See also the following authorities:

Suydam v. *Williamson*, 20 How., 427.
Thompson on Trials, Sec. 2771.
Hersey v. *Schaedel*, 6 Brad., 189.
2 Am. & Eng. Ency., p. 222.

It is, of course, true that the ordinary office and purpose of the bill of exceptions is to incorporate into the record, matters designed to be called to the attention of the reviewing court. It is none the less true, however, that the bill of exceptions is a part of the record, and that when the whole record is to be examined to see how and by what means the jury was waived, the bill of exceptions on that subject is the final authority. Counsel for the plaintiffs contend otherwise, but it can scarcely be doubted that were the other portions of the record silent upon the question of a stipulation in writing they would very vigorously contend for the right to imprison the defendants, if the bill of exceptions contained a recital that the defendants had executed a former waiver in writing. If, therefore, the recital in the judgment entry and the statement in the bill of exceptions could properly be regarded as inconsistent with each other, we should contend that the bill of exceptions should control. But such is not the case. The recital in the bill of exceptions is

not inconsistent with the recital in the judgment entry. It merely shows the real meaning of that recital. The stipulation was, in law, a stipulation of the parties, whether it was signed by them individually or by their attorneys, and as, from the recital in the judgment entry, it can not be determined whether the stipulation was the personal act of the defendants or was that of their attorneys, the recital in the bill of exceptions that the stipulation was the stipulation of the attorneys and not of the parties themselves, merely explains the judgment entry and shows what its true meaning is. It does not contradict it.

5. It was suggested in the court below by our adversaries that if the bill of exceptions can be looked into it will appear that there has been *res adjudicata* upon the question whether there was such a waiver of a trial by jury as the law required, and that the decision of the court upon that question, if erroneous, can only be reviewed in the Court of Appeals.

This contention would seem to be without force. It is true that the trial judge did determine that a trial by jury had been waived by the defendants in such a manner as to authorize him to try the case and render a judgment that would be binding on the defendants. To that extent, and no further, his decision is *res adjudicata* and not subject to dispute or contradiction upon the present motion. Were we here contending there was no valid judgment because the court had erroneously decided that a trial by jury had been waived, when in fact it had not been waived, we would be successfully met by the plea of *res adjudicata*. But as we have seen, to constitute a valid waiver of a trial by jury so as to authorize a trial before the court and a judgment upon the

court's finding, it was not necessary that there should be any waiver in writing of a trial by jury. It was sufficient that there was an agreement, either oral or in writing, made either by the parties or their attorneys that a jury should be waived.

Kearney v. *Case*, 12 Wallace, 275.

The act of 1893 only requires the execution by the defendants of a formal waiver in writing in case the plaintiff seeks to imprison the defendant for non-payment of the judgment. It does not prohibit a trial before the court by oral or written agreement of the parties or their attorneys as was permitted before that act was passed. When either of these methods of waiver are adopted the court is authorized to try the case without a jury and render a valid judgment. Upon examination of the bill of exceptions it will be found that the trial judge in fact based his decision that he could try the case without a jury on the ground that the defendants, prior to the time the case was called for trial, did in open court by their counsel consent and agree that the case might and should be tried before said trial judge. There was no stipulation authorizing him to try the case. The stipulation authorized a trial before Judge Grosscup. So that the decision of the trial judge was that the parties had waived a jury and consented to a trial before him orally and not by stipulation, and that consequently he had a right to try the case and render judgment.

The record will be found to be barren of any decision by the court as to the effect of the judgment rendered. The trial judge did not undertake to adjudicate upon the question as to how the judgment might be enforced.

6. It is claimed that the trial judge in his findings recites that the parties waived a jury trial in writing. The finding referred to uses substantially the same language as that above given and contained in the judgment entry. The purpose of a finding of facts by the judge is to enable the Court of Appeals to review the judge's rulings upon the questions of law presented thereby. In this respect it performs the same office as a bill of exceptions. And it is no more a part of the record than is the bill of exceptions. Furthermore, this recital in the findings is one which has no proper place there unless it be to preserve the fact that there was a stipulation in writing such as that contemplated by Section 649 of the Revised Statutes. A recital of that kind in the finding is one of the ways in which the fact that there was such a stipulation can be preserved. But the best evidence of that fact is the stipulation itself, which is held to properly form a part of the transcript of the record.

Kearney v. *Case*, 12 Wallace, 275.

Even were this finding of any greater force than the recital in the bill of exceptions it could not be construed as a finding that a formal waiver in writing of a jury trial had been executed by the defendants. On the contrary, as we have already shown, the finding is entirely consistent with the idea that the waiver referred to was one executed by the attorneys.

With respect to this point also, we suggest that if we were as clearly wrong as counsel for respondent seems to think we are, it is strange the Circuit court of Appeals did not so decide. The very fact that that court has based its decision upon the ground that the Illinois statute of 1893 is inapplicable to the United States courts

may be well be regarded as a sufficient demonstration that the point decided by them is the only point upon which they could base their judgment.

While other points are made in the brief and argument of counsel for respondent, we do not deem it necessary to refer to them, as we deem them unimportant.

Respectfully submitted.

HIRAM T. GILBERT,
For Petitioner.

163 U.S. 709

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 913.

THE UNITED STATES *EX REL.* RUDOLPH DEIMEL, APPELLANT,

vs.

JOHN W. ARNOLD, UNITED STATES MARSHAL.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FILED FEBRUARY 21, 1896.

(16,203.)

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a *Transcript of Record.*

In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, A. D. 1894.

UNITED STATES OF AMERICA *ex Rel.* RUDOLPH DEIMEL
vs.
JOHN W. ARNOLD, U. S. Marshal. } No. 221.

Appeal of Rudolph Deimel in the matter of the petition for a writ of *habeas corpus.*

Mr. Hiram T. Gilbert, counsel for appellant.
Mr. T. A. Moran, Mr. Adolf Kraus, Mr. I. H. Mayer, counsel for appellee.

Appeal from the circuit court of the United States for the northern district of Illinois, northern division.

Transcript of record filed December 21, 1894.
Printed record.

Filed Mar. 23, 1895.

OLIVER T. MORTON, *Clerk.*

b In the Circuit Court of the United States for the Northern District of Illinois, Northern Division.

In the Matter of the Petition of RUDOLPH DEIMEL for a Writ of *Habeas Corpus.* No. 23547.

1 Pleas in the circuit court of the United States for the northern division of the northern district of Illinois, begun and held at the United States court-room, in the city of Chicago, in said division and district, before the Hon. William J. Allen, district judge of the United States for the southern district of Illinois, on Tuesday, the twenty-eighth day of November, in the adjourned October term of said court, in the year of our Lord, one thousand eight hundred and ninety-four, and of our Independence the one hundred and nineteenth year.

S. W. BURNHAM, *Clerk.*

In the Matter of the Petition of RUDOLPH DEIMEL for a Writ of *Habeas Corpus.* 23547.

Be it remembered that on this day, to wit: the twenty-first day of November, A. D., 1894, came the petitioner, Rudolph Deimel, by his attorneys, Duncan and Gilbert, and filed in the clerk's office of said court, his bond for costs and petition for a writ of *habeas corpus,* which said bond for costs and petition for a writ of *habeas corpus* are respectively in the words and figures following, to wit:

Subscribed and sworn to before me this 21st day of November, A. D. 1894.

[SEAL.] GEORGE Q. ALLEN,
Notary Public.

(Copy.)

UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, Northern Division, }

The United States of America to the marshal of the northern district of Illinois, Greeting:

We command you, that you take Joseph Deimel and Rudolph Deimel, defendants, if they shall be found in your county, and them safely keep as by law required and herein commanded; so that you have their bodies to satisfy Julius Stroheim and Salo J. Stroheim, plaintiffs, in the sum of eighty-five hundred ($8,500.00) dollars, which the said plaintiffs, lately in the circuit court of the United States, for said district, on the 23rd day of July, 1894,
6 at the July term, 1894, of the circuit court of the United States in and for the northern division of the northern district of Illinois (which said term was begun and held at Chicago, in said northern division of said northern district of Illinois, on the first Monday of July, 1894), recovered against the said defendants and which by the said court was adjudged to the said plaintiffs for their damages in a plea of trespass on the case; and also the further sum of one hundred eleven dollars and ninety-five cents ($111.95) which was adjudged to the said plaintiffs for their costs and charges in that behalf expended, whereof the said defendants stand convicted as appears to us of record. You are so to take and keep said Joseph Deimel and Rudolph Deimel, defendants, as by law required, until said sums and all legal costs and expenses in said cause be paid and satisfied, or until they are discharged by due course or process of law, and do you have the moneys which may be paid on this writ ready to render said plaintiffs and make a return of said writ with an endorsement thereon, in what manner you shall have executed the same, in ninety days from the date hereof, as by law required.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, at Chicago, aforesaid, this 17th day of November, in the year of our Lord one thousand eight hundred and ninety-four, and of our Independence the one hundred and nineteenth year.

[SEAL.] (Signed) S. W. BURNHAM, *Clerk.*

A true copy.
Attest: S. W. BURNHAM, *Clerk.* [SEAL.]

(Endorsed:) No. 7882. Circuit court, United States, northern district of Illinois, northern division. Julius Stroheim, *et al. vs.* Joseph Deimel *et al.*, *ca. sa.*

Damages	$8,500 00
Costs	111 95
Judgment for	$8,611 95
Collect	$8,611 95

7 Judgment rendered July 23rd, A. D. 1894.
S. W. BURNHAM, *Clerk.*

MORAN, KRAUS & MAYER (302 *Wabash Ave.*),
Plaintiffs' Att'ys.

(Endorsed:) Filed Nov. 21, 1894. S. W. Burnham, clerk.

UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

In the United States Circuit Court in and for the Northern District of Illinois.

JULIUS STROHEIM and SALO J. STROHEIM }
vs.
JOSEPH DEIMEL and RUDOLPH DEIMEL. }

Be it remembered that on the trial of this cause, the same being again called for trial by and before the Honorable Romanzo Bunn, judge, then presiding in said court on the 28th day of March, 1894, the said defendants, by their counsel, in advance of the opening statements and before the introduction of any evidence, then and there moved for a continuance and then and there objected to the trial of said cause before the Honorable Romanzo Bunn, judge as aforesaid, and the said defendants based their said objection solely and exclusively upon a certain stipulation which was then and there produced and read and which is as follows:

8 "In the Circuit Court of the United States, Northern District of Illinois, Northern Division.

JULIUS STROHEIM and SALO J. STROHEIM }
vs. } Case.
JOSEPH DEIMEL and RUDOLPH DEIMEL. }

It is hereby stipulated and agreed by and between the parties that a trial by jury in the above-entitled cause shall be waived and that the said cause shall be submitted to the court for trial to be tried by Judge Grosscup.

MORAN, KRAUS & MAYER,
Att'ys for Plaintiffs.
DUNCAN & GILBERT,
Defendants' Att'ys."

That said stipulation bears the file-mark and the following indorsement in this case;

"21531, United States circuit court; Julius Stroheim, *et al. vs.* Joseph Deimel, *et al.* Stipulation waiving jury filed Jan. 9, 1893, S. W. Burnham, clerk."

The plaintiffs, in opposition to said objection and motion, proved the following:

That the said suit was begun on January 24th, 1890.

That the defendants were duly served herein January 24th, 1890.

That the declaration was filed herein on February 21, 1890.

That the defendants filed herein on March 5th, 1890, their plea of general issue.

That the plaintiffs filed herein their similiter to said general issue prior to the May term, 1890, of this court.

That the said case was duly at issue for the May term, 1890, of this court.

9 That plaintiffs duly noticed said case for trial at the May term, 1890, of this court, and that the said case was duly placed on the May, 1890, trial calendar of this court.

That the said case was duly reached and called for trial by the Honorable W. Q. Gresham, then judge of and presiding in this court, in June, 1890, when upon motion of the said defendants the said case was continued until the October, 1890 term of this court.

That at the term last aforesaid, this case was again, upon notice of plaintiffs, placed upon trial calendar of this court, for said October, 1890, term, when it was again called and reached for trial before the said Judge Gresham, and it was then again, upon motion of said defendants, continued to the May term, 1891, of this court.

That said case in due course was again continued from the May term, 1891, of this court to the October term, 1891, and again continued to the May term, 1892, of this court, and then again continued to the October term, 1892, of this court; that at each of said terms this case was duly placed and appeared upon the trial calendars of this court for said respective terms, that at each of said terms of this court, this case was duly reached and called for trial and that at each time that this case was so reached and called for trial and in every instance it was upon the motion of defendants continued to the next term; that in every instance such continuance was granted upon the motion of the defendants, either because of the sickness of one or the other of the counsel of defendants, or because of the absence from the city of Chicago of one or the other of the defendants, that at the October term, 1892, of this court, said case was again duly reached and called for trial by the Honorable P. S. Grosscup, then presiding in said court, that counsel for defendants again moved for a continuance that the plaintiffs resisted a further continuance on account of the delay that had already ensued, that thereupon in consideration of the plaintiffs withdrawing their objection to such continuance, the stipulation above recited was entered into; that thereupon said cause was continued to the May term, 1893, of this court; that at said term it was again duly

called and reached for trial; that on the ground of the illness of H. T. Gilbert, Esq., one of the counsel of defendants, this case was upon motion of defendants again continued to the October term, 1893, of this court, that at the October term, 1893, of this court the said case was again regularly noticed by the plaintiffs for trial and was placed upon the October, 1893, term calendar, of this
10 court, that at the opening of said October term, 1893, the said Judge Grosscup, called the trial calendar of this court for the purpose of ascertaining which of said cases were ready for trial and also for the purpose of separating those cases in which a jury had been or would be waived from those in which a jury would be called; that in November, 1893, the said Judge Grosscup called this case for trial, and by consent of the counsel for both plaintiffs and defendants herein set this case for trial for February 12th, 1894, that on January 23rd, 1894, said Judge Grosscup announced, in open court, from the bench, all parties to this case being then and there present at the time, that all causes, including this case, in which juries had been waived in this court would be set by said Judge Grosscup for trial during the month of March, 1894, by and before said Judge Bunn, that on January 31, 1894, said Judge Grosscup again called all of said cases, including this case, in which trial by jury had been waived, and in the presence of counsel for both parties hereto and with the consent and agreement of counsel for both parties hereto then and there given in open court set this case for trial on March 21st, 1894, before said Judge Bunn; that this case duly appeared on the regular daily published call of the calendar of cases to be tried March 21st, 1894, by and before said Judge Bunn; that it duly appeared upon such regular daily published call on March 21st, 1894, and upon every day thereafter until this case was duly reached for trial before said Judge Bunn on March 27th, 1894, that on March 27th, 1894, this case was duly reached by said Judge Bunn and called by him for trial; that at that time H. T. Gilbert, Esq., one of the counsel for the defendants, asked that the hearing of this case be delayed for a day or two, because he, said Gilbert, was not entirely ready, that thereupon, with the consent and agreement in open court then and there given by counsel for both parties hereto, this case was set peremptorily for hearing before said Judge Bunn on March 28th, 1894, that it was duly called by said Judge Bunn for trial on March 28th, 1894, that then for the first time the objection was made by defendants' counsel to trying this case before said Judge Bunn and said objection was based solely upon the stipulation hereinbefore set forth, that at no time prior thereto was any objection made by said defendants or either of them to this case being tried without a jury before said Judge Bunn, that on the contrary both of the said defendants in open court, by their counsel, expressly consented and agreed upon several different occasions prior to said March 28th, 1894, that this case might and should be tried before said Judge Bunn without a jury.

11 Which was all the proof or evidence introduced by either party upon the hearing of said objection;

And said stipulation in writing was the only stipulation or waiver

in writing filed in said cause for the submission of said cause for trial without a jury;

Whereupon the court overruled said motion and said objection and proceeded to the trial of said cause without a jury and to the action of the court in so overruling said objection of the defendants, the defendants by their counsel then and there excepted, and to the action of the court in proceeding to the trial of said cause without a jury the defendants, by their counsel, then and there excepted, and to the action of the court in overruling said motion the defendants by their counsel then and there excepted.

And forasmuch as the matters above set forth do not fully appear of record, the defendants tender this, their bill of exceptions, and pray that the same may be signed and sealed by the said judge of this court pursuant to the statutes in such case made and provided and pursuant to the practice of this court, which is done accordingly this 23rd day of August, A. D. 1894.

R. BUNN, [SEAL.]
Dist. Judge.

O. K.
MORAN, KRAUS & MAYER,
Pl'tffs' Att'ys.

O. K.
DUNCAN & GILBERT,
Def'ts' Att'ys.

(Endorsed:) Filed Sept. 17, 1894. S. W. Burnham, clerk.

A true copy.
Attest: S. W. BURNHAM, *Clerk.* [SEAL.]

(Endorsed:) Filed Nov. 21, 1894. S. W. Burnham, clerk.

12 On the same day, to wit, the twenty-first day of November, in the adjourned October term of said court, 1894, in the record of proceedings thereof, in said entitled cause, before the Hon. William H. Seaman, district judge of the United States for the eastern district of Wisconsin, appears the following entry, to wit:

In the Matter of the Petition of RUDOLPH DEIMEL for a Writ of *Habeas Corpus.*

Now comes the petitioner by his attorneys, and files his petition for a writ of *habeas corpus*, and the court, having inspected said petition and the exhibits thereto attached, orders that a writ of *habeas corpus* issue forthwith.

On the same day, to wit: on the twenty-first day of November, 1894, a writ of *habeas corpus* issued out of the clerk's office of said court, directed to the marshal of said district to execute, which said writ, together with marshal's return thereto attached, is in the words and figures following, to wit:

Writ of Habeas Corpus.

CIRCUIT COURT OF THE UNITED STATES, } ss:
Northern District of Illinois, }

The United States of America to John W. Arnold, United States marshal for the northern district of Illinois, Greeting:

We command you that you do on the twenty-second day of November, 1894, at ten o'clock a. m., without excuse or delay, bring or cause to be brought before the circuit court of the United States of America, for the northern district of Illinois, to be sitting in the court-room of said circuit court, in the city of Chicago, in said district, the body of Rudolph Deimel, by whatever name or addition he is known or called, and who is now unlawfully detained
13 in your custody, as it is said, together with the day and cause of his caption and detention then and there to perform and abide such order and direction as our said circuit court shall make in that behalf. Hereof make due return under the penalty of what the law directs.

To the marshal of the northern district of Illinois to execute.

Witness the Hon. Melville W. Fuller, Chief Justice of the United States of America, at Chicago, aforesaid, this 21st day of November, in the year of our Lord one thousand eight hundred and ninety-four and of our Independence the 119th year.

[SEAL.] S. W. BURNHAM, *Clerk.*

(Endorsed.)

UNITED STATES OF AMERICA, } ss:
Northern Div. of Northern Dist. of Ill., }

I, Geo. A. Carpenter, served the within writ upon John W. Arnold, U. S. marshal, on Nov. 21st, A. D. 1894, by delivering to him this writ and acquainting him with the contents thereof.

GEO. A. CARPENTER.

I swear the above is true.

GEO. A. CARPENTER.

Subscribed and sworn to before me this Nov. 22, A. D. 1894.

S. W. BURNHAM, *Clerk.*

(Endorsed:) "By the *habeas corpus* act." 23547. 603. Circuit court United States, northern district of Illinois. In the matter of the petition of Rudolph Deimel for a writ of *habeas corpus.* Writ of *habeas corpus.* Returnable —. S. W. Burnham, clerk. Duncan and Gilbert, Pence and Carpenter, att'y- for petitioner.

14 UNITED STATES OF AMERICA, } ss.:
Northern District of Illinois, Northern Division, }

In the Circuit Court of the United States in and for the Northern Division of the Northern District of Illinois.

In the Matter of the Petition of RUDOLPH DEIMEL for a Writ of *Habeas Corpus.*

John W. Arnold, marshal in and for the district aforesaid, the respondent to whom the annexed writ is directed for return thereto, respectfully submits to your honor that true it is that the said Rudolph Deimel, therein named is confined and restrained of his liberty by this respondent but the said John W. Arnold, respondent, alleges that the said Rudolph Deimel is so restrained lawfully under and by virtue of a certain writ of *capias ad satisfaciendum* which was issued on the 17th day of November, 1894, out of the circuit court of the United States in and for the northern division of the northern district of Illinois, that by virtue of said writ, this respondent took the body of said Rudolph Deimel in execution, which is the true cause of his, said Deimel's imprisonment, that a true copy of said writ of *capias ad satisfaciendum* is as follows:

UNITED STATES OF AMERICA, }
Northern District of Illinois, Northern Division. }

United States of America to the marshal of the northern district of Illinois, Greeting:

We command you that you take Joseph Deimel and Rudolph Deimel, defendants, if they may be found in your county, and them safely keep as by law required and herein commanded, so
15 that you have their bodies to satisfy Julius Stroheim and Salo J. Stroheim, plaintiffs, in the sum of eighty-five hundred ($8,500) dollars, which the said plaintiffs lately in the circuit court of the United States for said district, on the 23rd day of July, 1894, at the July term 1894, of the circuit court of the United States in and for the northern division of the northern district of Illinois, (which said term was begun and held at Chicago in said northern division of said northern district of Illinois, on the first Monday of July, 1894), recovered against the said defendants and which by the said court was adjudged to the said plaintiffs for their damages in a plea of trespass on the case; and also the further sum of one hundred and eleven dollars and ninety-five cents ($111.95) which was adjudged to the said plaintiffs for their costs and charges in that behalf expended, whereof the said defendants stand convicted as appears to us of record. You are so to take and keep said Joseph Deimel and Rudolph Deimel, defendants, as by law required until said sums and all legal costs and expenses in said cause be paid and satisfied or until they are discharged by due course or process of law, and do you have the monies which may be paid on this writ ready to render said plaintiffs and make a return of said writ, with an

endorsement thereon in what manner you shall have executed the same, in ninety days from the date hereof, as by law required.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this 17th day of November, in the year of our Lord one thousand eight hundred and ninety-four, and of our Independence the one hundred and 19th year.

[Seal the Circuit Court U. S., Northern Dist. Illinois, 1855.]

S. W. BURNHAM, *Clerk.*

Indorsed as follows: No. 29. 21531. No. 7882. Circuit court United States, northern district of Illinois, northern division.
16 Julius Stroheim *et al. vs.* Joseph Deimel *et al.* *Ca. sa.* Damages, $8,500.00; costs, $111.95; judgment for $8,611.95; defendant's costs, $—; collect $8,611.95. Judgment rendered July 23, A. D. 1894. S. W. Burnham, clerk. Moran, Kraus & Mayer, plaintiffs' att'y-.

Wherefore the said John W. Arnold, marshal aforesaid, has here before your honor the body of the said Rudolph Deimel, together with the said writ as therein he is commanded.

Dated November 27, 1894.

J. W. ARNOLD,
Marshal for the Northern District of Illinois.

(Endorsed:) Filed Nov. 22, 1894. S. W. Burnham, clerk.

Afterwards, to wit: on the twenty-second day of November, in the adjourned October term of said court, 1894, in the record of proceedings thereof, in said entitled cause before the Hon. William J. Allen, district judge of the United States for the southern district of Illinois, appears the following entry, to wit:

In the Matter of the Petition of RUDOLPH DEIMEL for a Writ of *Habeas Corpus.*

This cause having come on to be heard upon the motion of said petitioner to be released and discharged from arrest, confinement and imprisonment in which he is held by J. W. Arnold, the marshal of the United States for the northern district of Illinois, under and by virtue of a writ of *capias ad satisfaciendum* issued out of the circuit court of the United States for the northern division of the northern district of Illinois, under the facts and conditions
17 set forth in the petition of said Rudolph Deimel, the return of the marshal to the writ of *habeas corpus* issued herein, and the court having read and considered the petition, and the return of the marshal to said writ, and the arguments of the respective counsel, takes the same under advisement.

Afterwards, to wit: on the twenty-seventh day of November, in the adjourned October term of said court, 1894, in the record of

proceedings thereof, in said entitled cause before the Hon. William J. Allen, district judge of the United States for the southern district of Illinois, appears the following entry, to wit:

In the Matter of the Petition of RUDOLPH DEIMEL for a Writ of *Habeas Corpus.*

Now come the parties by their attorneys and the court having considered and being now fully advised in the premises doth order and adjudge that the motion of said petitioner to be discharged from the custody of said marshal be and it is hereby denied and that said petitioner be remanded to the custody of the marshal and that his said petition be and it is hereby dismissed.

Afterwards, to wit, on the twenty-eighth day of November, in the adjourned October term of said court, 1894, in the record of proceedings thereof, in said entitled cause before the Hon. William J. Allen, district judge of the United States for the southern district of Illinois, appears the following entry, to wit:

In the Matter of the Petition of RUDOLPH DEIMEL for a Writ of *Habeas Corpus.*

Now come the parties by their attorneys, and an appeal to the United States circuit court of appeals is allowed to said petitioner, the appeal bond is fixed at the sum of two hundred and fifty dollars, and the said petitioner enters a recognizance in the sum of twelve thousand dollars.

18 On the hearing of this cause the following exceptions were taken and allowed by the court and made of record, which said exceptions are in the words and figures following, to wit:

Bill of Exceptions.

UNITED STATES OF AMERICA, }
Northern District of Illinois, Northern Division, } *ss:*

In the United States Circuit Court.

In the Matter of the Petition of RUDOLPH DEIMEL for a Writ of *Habeas Corpus.*

Be it remembered that upon the hearing of the above-entitled cause on this 28th day of November, A. D. 1894, there was offered in evidence by the relator the original bill of exceptions in the proceedings of the circuit court of the United States in and for the northern division of the northern district of Illinois, in the case of Julius Stroheim, *et al. vs.* Joseph Deimel, *et al.*, being the case in which the *capias ad satisfaciendum* mentioned in the return in this cause was issued, which bill of exceptions is as follows:

UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

In the United States Circuit Court in and for the Northern Division of the Northern District of Illinois.

JULIUS STROHEIM and SALO J. STROHEIM }
vs.
JOSEPH DEIMEL and RUDOLPH DEIMEL. }

Be it remembered, that on the trial of this cause, the same being again called for trial by and before the Honorable Romanzo
19 Bunn, judge, then presiding in said court on the 28th day of March, 1894, the said defendants, by their counsel, in advance of the opening statements and before the introduction of any evidence, then and there moved for a continuance and then and there objected to the trial of said cause before the Honorable Romanzo Bunn, judge, as aforesaid, and the said defendants based their said objection solely and exclusively upon a certain stipulation which was then and there produced and read and which is as follows:

In the Circuit Court of the United States, Northern District of Illinois, Northern Division.

"JULIUS STROHEIM and SALO J. STROHEIM }
vs. } Case.
JOSEPH DEIMEL and RUDOLPH DEIMEL. }

"It is hereby stipulated and agreed by and between the parties that a trial by jury in the above-entitled cause shall be waived and that the said cause shall be submitted to the court for trial to be tried by Judge Grosscup.

MORAN, KRAUS & MAYER,
Att'ys for Plaintiffs.
DUNCAN & GILBERT,
Defendants' Att'ys."

That said stipulation bears the file-mark and the following indorsement in this case:

"21531. United States circuit court. Julius Stroheim *et al. vs.* Joseph Deimel *et al.* Stipulation waiving jury. Filed Jan. 9, 1893. S. W. Burnham, clerk."

The plaintiffs, in opposition to said objection and motion, proved the following:

That the said suit was begun on January 24th, 1890;

That the defendants were duly served herein January 24th, 1890;

20 That the declaration was filed herein on February 21, 1890;

That the defendants filed herein on March 5th, 1890, their plea of general issue;

That the plaintiffs filed herein their similiter to said general issue prior to the May term, 1890, of this court;

That the said case was duly at issue for the May term, 1890, of this court;

That plaintiffs duly noticed said case for trial at the May term, 1890, of this court, and that the said case was duly placed on the May, 1890, trial calendar of this court;

That the said case was duly reached and called for trial by the Hon. W. Q. Gresham, then judge of and presiding in this court, in June, 1890, when upon motion of the said defendants the said case was continued until the October, 1890, term of this court;

That at the term last aforesaid this case was again, upon notice of plaintiffs, placed upon trial calendar of this court, for said October, 1890, term, when it was again called and reached for trial before the said Judge Gresham, and it was then again, upon motion of said defendants, continued to the May term, 1891, of this court;

That said case in due course was again continued from the May term, 1891, of this court to the October term, 1891, and again continued to the May term, 1892, of this court, and then again continued to the October term, 1892, of this court; that at each of said terms this case was duly placed and appeared upon the trial calendars of this court for said respective terms; that at each of said terms of this court, this case was duly reached and called for trial and that at each time that this case was so reached and called for trial and in every instance it was upon the motion of defendants continued to the next term; that in every instance such continuance was granted upon the motion of the defendants either because of the sickness of one or the other of the counsel of defendants, or because of the absence from the city of Chicago of one or the other of the defendants, that at the October term, 1892, of this court, said case was again duly reached and called for trial by the Honor-
21 able P. S. Grosscup, then presiding in said court, that counsel for defendants again moved for a continuance, that the plaintiffs resisted a further continuance on account of the delay that had already ensued, that thereupon in consideration of the plaintiffs withdrawing their objection to such continuance, the stipulation above recited was entered into; that thereupon said cause was continued to the May term, 1893, of this court; that at said term it was again duly called and reached for trial; that on the ground of the illness of H. T. Gilbert, Esq., one of the counsel of defendants, this case was upon motion of defendants again continued to the October term, 1893, of this court, that at the October term, 1893, of this court the said case was again regularly noticed by the plaintiffs for trial and was placed upon the October, 1893, term calendar of this court, that at the opening of said October term, 1893, the said Judge Grosscup, called the trial calendar of this court for the purpose of ascertaining which of said cases were ready for trial and also for the purpose of separating those cases in which a jury had been or would be waived from those in which a jury would be called; that

in November, 1893, the said Judge Grosscup called this case for trial, and by consent of the counsel for both plaintiffs and defendants herein set this case for trial for February 12th, 1894, that on January 23rd, 1894, said Judge Grosscup announced, in open court, from the bench, all parties to this case being then and there present at the time, that all causes, including this case, in which juries had been waived in this court would be set by said Judge Grosscup for trial during the month of March, 1894, by and before said Judge Bunn, that on January 31, 1894, said Judge Grosscup again called all of said cases, including this case, in which trial by jury had been waived, and in the presence of counsel for both parties hereto and with the consent and agreement of counsel for both parties hereto then and there given in open court set this case for trial on March 21st, 1894, before said Judge Bunn; that this case duly appeared on the regular daily published call of the calendar of cases to be tried March 21st, 1894, by and before said Judge Bunn, that it duly appeared upon such regular daily published call on March 21st, 1894, and upon every day thereafter until this case was duly reached for trial before said Judge Bunn on March 27th, 1894, that on March 27th, 1894, this case was duly reached by said Judge Bunn and called by him for trial; that at that time H. T. Gilbert, Esq., one of the counsel for the defendants, asked that the hearing of this case be delayed for a day or two, because he, said Gilbert, was not entirely ready, that thereupon, with the consent and agreement in open court then and there given by counsel for both parties hereto, this case was set peremptorily for hearing before said Judge
22 Bunn on March 28th, 1894, that it was duly called by said Judge Bunn for trial on March 28th, 1894, that then for the first time the objection was made by defendants' counsel to trying this case before said Judge Bunn and said objection was based solely upon the stipulation hereinbefore set forth, that at no time prior thereto was any objection made by said defendants or either of them to this case being tried without a jury before said Judge Bunn, that on the contrary both of the said defendants in open court, by their counsel, expressly consented and agreed upon several different occasions prior to said March 28th, 1894, that this case might and should be tried before said Judge Bunn without a jury;

Which was all the proof or evidence introduced by either party upon the hearing of said objection;

And said stipulation in writing was the only stipulation or waiver in writing filed in said cause for the submission of said cause for trial without a jury;

Whereupon the court overruled said motion and said objection and proceeded to the trial of said cause without a jury and to the action of the court in so overruling said objection of the defendants, the defendants by their counsel then and there excepted, and to the action of the court in proceeding to the trial of said cause without a jury the defendants, by their counsel, then and there excepted, and to the action of the court in overruling said motion the defendants by their counsel then and there excepted.

And forasmuch as the matters above set forth do not fully ap-

pear of record, the defendants tender this, their bill of exceptions, and pray that the same may be signed and sealed by the said judge of this court pursuant to the statutes in such case made and provided and pursuant to the practice of this court, which is done accordingly this 23rd day of August, A. D. 1894.

R. BUNN,
Dist. Judge.

[SEAL.]

O. K.
MORAN, KRAUS & MAYER,
Plaintiffs' Attorneys.

O. K.
DUNCAN & GILBERT,
Defendants' Attorneys.

23 (Endorsed:) G. No. 21531. T. No. —. U. S. circuit court. Stroheim *vs.* Deimel. Bill of exceptions. Filed Sept. 17, 1894. S. W. Burnham, clerk. Moran, Kraus & Mayer, attorneys and counselors.

To the introduction of which bill of exceptions the respondent objected on the ground that the same was incompetent, immaterial and inadmissible; but the court admitted said bill of exceptions in evidence, subject to said objections.

There was also offered in evidence the findings of said circuit court of the United States and the record of the judgment entered upon said findings in said case of Julius Stroheim, *et al. vs.* Joseph Deimel, *et al.*, which findings and judgment record are as follows:

UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

In the United States Circuit Court in and for the Northern Division of the Northern District of Illinois.

JULIUS STROHEIM and SALO J. STROHEIM }
vs.
JOSEPH DEIMEL and RUDOLPH DEIMEL. }

This cause coming on now to be heard before the court without the intervention of a jury, a jury having heretofore been expressly waived by stipulation in writing of all of the parties hereto, which said stipulation was heretofore duly filed herein by the attorneys of record for the parties to this suit with the clerk of this court and the court having heard the proofs and the allegations of the parties and the arguments of counsel, finds therefrom:

First. That the plaintiffs, Julius Stroheim and Salo J. Stroheim, were at the time of the commencement of this suit and continuously since then have been and now are citizens of the State of New York, and residents of the city of New York, in said State of New York, and did business under the firm name of J. Stroheim & Son and J. Stroheim & Company in said city of New York.

24 Second. That the defendants, Joseph Deimel, and Rudolph Deimel, were at the time of the commencement of this suit and continuously since have been and now are citizens of the State of Illinois and residents of the city of Chicago in said State of Illinois, and together with one Simon Deimel, composed the firm of R. Deimel & Brothers.

Third. That this court at the time of the commencement of this suit had and now has jurisdiction of all the parties to this suit and of the subject-matter thereof.

Fourth. That all of the material allegations of the declaration filed herein have been fully and duly proved and are true.

Fifth. That before the commencement of this suit and at the times and places alleged in said declaration, both the defendants, Joseph Deimel and Rudolph Deimel, wilfully and intentionally made false and fraudulent representations of material facts in regard to their financial condition as set out in the declaration herein, then and there knowing the said representations to be false and untrue; to the plaintiffs, Julius Stroheim and Salo J. Stroheim, with the intention then and there entertained on the part of both of said defendants to induce the said plaintiffs to sell and deliver to said defendants' said firm of R. Deimel & Brothers upon trust and credit, the certain goods and merchandise mentioned in said declaration.

Sixth. That said plaintiffs, Julius Stroheim and Salo J. Stroheim, relied solely upon said representations so made to them by said defendants and believed the same to be true, and not knowing to the contrary thereof, but relying solely thereon, before the commencement of this suit and at the times in said declaration mentioned, sold and delivered upon trust and credit to said defendants' said firm of R. Deimel & Brothers certain goods and merchandise of the amount and value and at the agreed purchase price of $7,302.75. That said goods and merchandise were received by said firm of R. Deimel & Brothers and were by said firm sold and disposed of and the proceeds thereof were applied to the use and benefit of both of said defendants.

Seventh. That said representations of fact so made as aforesaid by said defendants were as aforesaid there and then made by said defendants for the purpose of deceiving said plaintiffs and for the purpose of obtaining from said plaintiffs for said defendants'
25 said firm the said goods and merchandise so as aforesaid sold and delivered by said plaintiffs to said defendants' said firm upon trust and credit as aforesaid, and were then and there made by said defendants to said plaintiffs with the sole purpose and intent to cheat and defraud said plaintiffs out of said goods and merchandise so sold and delivered as aforesaid by said plaintiffs to said defendants' said firm and out of the value thereof and with the preconceived intent and design then and there entertained by said defendants that said defendants and said defendants' said firm would never pay for said goods and merchandise; that said defendants and each of them knew that said representations of fact were wholly false and untrue at the time the same were made.

Eighth. That said plaintiffs would not have sold or delivered

said goods and merchandise to said defendants' said firm had not said plaintiffs believed said representations so made by said defendants as aforesaid to be true; that no part of said goods and merchandise so sold and delivered by said plaintiffs to said defendants' said firm has ever been paid for by said defendants or by said defendants' said firm or by any or either of them, or by any one for or on their behalf; that the said value and purchase price of said goods and merchandise, to wit: $7,302.75, became due and payable from said defendants' said firm and the said members of said firm to said plaintiffs before the commencement of this suit.

Ninth. That by reason of the making of said false and fraudulent representations as aforesaid by the said defendants to said plaintiffs, the said plaintiffs have been defrauded by said defendants out of said goods and merchandise so sold and delivered as aforesaid, and out of the value thereof.

Tenth. That the fair market value of said goods and merchandise so as aforesaid sold and delivered by said plaintiffs to said defendants' said firm upon trust and credit as aforesaid was at the time of the sale and delivery of said goods and merchandise as aforesaid $7,302.75, that no part of said market value or of said purchase price of said goods and merchandise has been paid except that said plaintiffs received on August 21st, 1893, from Thomas Parker, Jr., receiver of said firm of R. Deimel & Brothers the sum of $371.60, as a dividend upon the said plaintiffs' claim embraced in this suit.

Eleventh. That said plaintiffs are entitled to recover from said defendants, Joseph Deimel and Rudolph Deimel, interest
26 upon said sum of $7,302.75 at the rate of five per cent. (5 %) per annum from January 24th, 1890, the date of the commencement of this suit, that said interest amounts to at least the sum of $1,568.85, that said defendants are entitled to a deduction and credit of said sum of $371.60, so as aforesaid paid as a dividend to said plaintiffs by the receiver of said defendants' said firm.

Twelfth. That said plaintiffs have been injured and have sustained damages in the premises to the amount of eighty-five hundred dollars ($8,500.00).

Thirteenth. Wherefore the court finds the defendants, Joseph Deimel and Rudolph Deimel, guilty of the several grievances in plaintiffs' declaration laid to said defendants' charge in manner and form as the plaintiffs have in their declaration complained against said defendants and hereby assesses the damages of said plaintiffs, Julius Stroheim and Salo J. Stroheim, by reason thereof at the sum of $8,500.00.

And as a conclusion of law the court finds that the plaintiffs, Julius Stroheim and Salo J. Stroheim, are entitled to a judgment for eighty-five hundred ($8,500.00) dollars against said defendants, Joseph Deimel and Rudolph Deimel.

R. BUNN, *Judge.*

(Endorsed:) G. No. 21531. T. No. 45. U. S. circuit court, northern district of Illinois. Julius Stroheim, *et al. vs.* Joseph Deimel, *et al.* Findings. Filed Jul- 23, 1894. S. W. Burnham, clerk.

27 Circuit Court of the United States, Northern Division of the Northern District of Illinois.

MONDAY, *July* 23, 1894.

Present: Hon. Peter S. Grosscup, district judge.

The following order is entered by the direction of the Hon. Romanzo Bunn, district judge for the western district of Wisconsin:

JULIUS STROHEIM *et al.*
vs.
JOSEPH DEIMEL and RUDOLPH DEIMEL.

On the stipulation in writing of all the parties hereto heretofore duly filed herein by the attorneys of record for the parties to this suit with the clerk of this court, this cause is submitted to the court for trial without the intervention of a jury, and the court now after hearing all the evidence adduced, the arguments of counsel, and being duly advised in the premises, finds the defendants, Joseph Deimel and Rudolph Deimel, guilty and assesses the plaintiffs' damages at the sum of eighty-five hundred ($8,500.00) dollars.

Therefore, it is considered by the court that the plaintiffs, Julius Stroheim and Solo J. Stroheim, do have and recover of and from the said defendants, Joseph Deimel and Rudolph Deimel, their said damages of eighty-five hundred ($8,500.00) dollars, in form as aforesaid, by the court assessed, together with their costs and charges in this behalf taxed at the sum of ——, and that the plaintiffs have execution therefor.

To the introduction of said findings the petitioner by his counsel then and there objected, but the court overruled the objection and admitted said findings in evidence, to which ruling of the court the petitioner by his counsel then and there excepted.

28 To the introduction of said judgment entry the petitioner by his counsel then and there objected, but the court overruled said objections and admitted the same in evidence, to which ruling the petitioner by his counsel then and there excepted.

There was then offered in evidence the *capias ad satisfaciendum* which issued in said case of Julius Stroheim, *et al. vs.* Joseph Deimel *et al.*, and upon which the respondent herein held said relator in custody, and the same was admitted against the objection of the petitioner, to which ruling — then and there excepted.

The foregoing was all the evidence offered or introduced by either party upon the hearing of this cause.

After the hearing of the evidence the court ordered and adjudged that the motion of the petitioner to be discharged from his arrest, confinement and imprisonment be overruled and denied; that his petition be dismissed and that he be remanded to the custody of

the marshal and that he pay the costs of these proceedings to be taxed, to which ruling the petitioner by his counsel then and there excepted.

And forasmuch as the matters aforesaid do not appear of record the said petitioner prays that this his bill of exceptions may be signed and sealed by the judge of said court, which is done accordingly, and it is ordered that a transcript of this bill of exceptions be incorporated into the transcript of the record of this cause to be sent to the circuit court of appeals in and for the seventh circuit upon the prosecution by the relator of his appeal herein for the purpose of presenting to said circuit court of appeals the questions of law and fact involved in said cause.

WILLIAM J. ALLEN. [SEAL.]

(Endorsed:) Filed Nov. 28, 1894. S. W. Burnham, clerk.

On the same day, to wit, the twenty-eighth day of November, 1894, came Rudolph Deimel, by his attorneys, and filed in the clerk's office of said court his assignment of error, which said assignment of error is in the words and figures following, to wit:

29 *Assignment of Error.*

Circuit Court of Appeals in and for the Seventh Circuit.

RUDOLPH DEIMEL, Appellant, *vs.* JOHN W. ARNOLD, Marshal of the United States for the Northern District of Illinois, Appellee.	Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

And now comes the said Rudolph Deimel, by James W. Duncan and Hiram T. Gilbert, his attorneys, and says that in the record and proceedings aforesaid, in said circuit court, manifest error hath intervened to the prejudice of him, the appellant, in this, to wit:

First. The said circuit court erred in discharging the writ of *habeas corpus* in said cause and in dismissing the petition and remanding the said Rudolph Deimel to the custody of the marshal.

Second. The said circuit court erred in not discharging the said Rudolph Deimel.

Wherefore, for these and other errors appearing in the record to the prejudice of the said Rudolph Deimel, he prays that the order and judgment entered by said circuit court in said cause may be reversed, &c.

JAMES W. DUNCAN &
HIRAM T. GILBERT,
GEO. A. CARPENTER,
Attorneys for Appellant.

(Endorsed:) Filed Nov. 28, 1894. S. W. Burnham, clerk.

30 On the same day, to wit, the twenty-eighth day of November, 1894, came Rudolph Deimel and filed in the clerk's office of said court, his appeal bond, which said appeal bond is in the words and figures following, to wit:

Appeal Bond.

Know all men by these presents: That we, Rudolph Deimel, as principal, and Jacob Liebenstein, Charles L. Miller and Louis K. Miller, as sureties, all of the city of Chicago, county of Cook, and State of Illinois, are held and firmly bound unto John W. Arnold, marshal of the United States of America, in and for the northern district of Illinois, in the penal sum of two hundred and fifty dollars ($250) lawful money of the United States, for the payment of which well and truly to be made, we bind ourselves, our heirs, executors, administrators and assigns jointly and severally by these presents.

Witness our hands and seals this 28th day of November, A. D. 1894.

Whereas, in a certain proceeding instituted in the circuit court of the United States for the northern district of Illinois, and in the northern division thereof, upon the petition of said Rudolph Deimel to be released and discharged from arrest and confinement under a certain writ of *capias ad satisfaciendum*, mentioned in said petition, upon which petition the said circuit court awarded to the said Rudolph Deimel the writ of *habeas corpus* directed to the marshal of said district then holding the said Rudolph Deimel in custody by virtue of said writ of *capias ad satisfaciendum* and

Whereas, the said marshal, pursuant to the terms of said writ has produced the body of said Rudolph Deimel before the court and has filed in said cause his return to said writ, and the said circuit court, upon consideration of the matters set forth in said petition and return of said marshal and the matters presented in connection therewith, has ordered and adjudged that the motion of said Rudolph Deimel to be discharged from his said imprisonment be

31 overruled and denied, that the writ of *habeas corpus* issued upon said petition aforesaid, be discharged and that the said petition be dismissed at the costs of the petitioner and that he, the said Rudolph Deimel, be remanded to the custody of said marshal, from which said order and judgment of said circuit court the said Rudolph Deimel has prayed for and obtained an appeal to the circuit court of appeals of the United States, in and for the seventh judicial circuit.

Now, therefore, the condition of the above obligation is such that if the said Rudolph Deimel shall well and truly prosecute his said appeal with effect and shall moreover well and truly pay or cause to be paid all costs and damages properly chargeable against him in case the said order and judgment of the said circuit court shall be affirmed in and by the said circuit court of appeals then and in

that event this obligation to be void, otherwise to remain in full force and effect.

RUDOLPH DEIMEL. [SEAL.]
JACOB LIEBENSTEIN. [SEAL.]
CHAS. L. MILLER. [SEAL.]
LOUIS K. MILLER. [SEAL.]

Approved.
S. W. BURNHAM, *Clerk.*

(Endorsed:) Filed Nov. 28, 1894. S. W. Burnham, clerk.

On the same day, to wit, the twenty-eighth day of November, 1894, came Rudolph Deimel and filed in the clerk's office of said court his bond, which said bond is in the words and figures following, to wit:

32 *Bond.*

Know all men by these presents that we, Rudolph Deimel, Jacob Liebenstein, Charles L. Miller and Louis K. Miller, of the county of Cook and State of Illinois, are held and firmly bound unto Julius Stroheim and Salo J. Stroheim, of the city and State of New York, —— in the penal sum of twelve thousand ($12,000) dollars, for the payment of which well and truly to be made we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally, firmly by these presents.

Witness our hands and seals this 28th day of November, A. D. 1894.

The condition of the above obligation is such that whereas, in the circuit court of the United States in and for the northern division of the northern district of Illinois, in a certain proceeding therein pending for a writ of *habeas corpus*, wherein said Rudolph Deimel was the petitioner, and John W. Arnold, marshal of the United States of America, in and for the northern district of Illinois, was the respondent, said circuit court did, on the 27th day of November, A. D. 1894, enter an order in said proceeding, remanding said Rudolph Deimel, petitioner as aforesaid, to the custody of said marshal, from which said order said Rudolph Deimel has prayed for and obtained an appeal to the circuit court of the United States in and for the seventh judicial circuit, and an order that, pending said appeal, to be enlarged and released from the custody of the said marshal.

Now, therefore, if the said Rudolph Deimel shall, in case said judgment shall be affirmed by said circuit court of appeals, surrender himself to the custody of said marshal, or his successor in office within thirty (30) days after the affirmance of said judgment, or shall thereupon pay or cause to be paid to said Julius Stroheim and Salo J. Stroheim the amount of the judgment mentioned in the *the* writ of *capias ad satisfaciendum* issued in the case of Julius St-oheim *et al. against* Joseph Deimel *et al.*, being case General Number 21531 of this court, a copy of

H. T. G.

which said writ is attached to the petition for a writ of *habeas*
33 *corpus* filed in the proceeding above mentioned, together with interest and costs, then this obligation to be void, otherwise to remain in full force and affect.

RUDOLPH DEIMEL. [SEAL.]
JOSEPH LIEBENSTEIN. [SEAL.]
CHAS. L. MILLER. [SEAL.]
LOUIS K. MILLER. [SEAL.]

Approved by me Nov. 28, 1894.

WILLIAM J. ALLEN,
U. S. Dist. Judge.

Interlineations above opposite my initials were made before signing by principal and sureties.

HIRAM T. GILBERT.

(Endorsed:) Filed Nov. 28, 1894. S. W. Burnham, clerk.

Afterwards, to wit, on the eleventh day of December, in the adjourned October term of said court, 1894, in the record of proceedings thereof, in said entitled cause before the Hon. William J. Allen, district judge of the United States for the southern district of Illinois, appears the following entry, to wit:

34 In the Matter of the Petition of RUDOLPH DEIMEL for a Writ of *Habeas Corpus*.

This day came the parties by their respective attorneys, and thereupon on motion of the petitioner by his attorneys, it is ordered by the court that the order entered herein on the twenty-eighth day of November, A. D. 1894, be and the same is hereby amended so as to read as follows:

This cause having come on to be heard upon the motion of the petitioner, Rudolph Deimel, to be released and discharged from the arrest, confinement and imprisonment in which he is held by the marshal of the United States for the northern district of Illinois, under and by virtue of a certain writ of *capias ad satisfaciendum* issued upon a certain judgment heretofore entered in this court in favor of Julius Stroheim and Salo J. Stroheim and against Joseph Deimel and said Rudolph Deimel the petition of said Rudolph Deimel and the return of the marshal to the writ of *habeas corpus* issued thereon, and the evidence heard by the court, and the court, having heard and considered the said petition and the return to the said writ, and also having heard the evidence introduced by the respective parties in support of the said petition and the said return, and also having heard the arguments of counsel upon said motion in behalf of the said petitioner and also on behalf of the said marshal and the said plaintiffs in said writ of *capias ad satisfaciendum*, and being now fully advised in the premises, it is considered and adjudged by the court that under the facts set forth

in the said petition and the return of the marshal to said writ of *habeas corpus* and the evidence heard by the court, the said petitioner, Rudolph Deimel, is rightfully held by said marshal under said writ of *capias ad satisfaciendum*, and it is therefore ordered and adjudged by the court that the motion of the said petitioner to be discharged from his arrest, confinement and imprisonment under the said writ of *capias ad satisfaciendum* be and the same is hereby overruled and denied and that his petition aforesaid be and the same is hereby dismissed, and that the said Rudolph Deimel be and he is hereby remanded to the custody of the said marshal and that the writ of *habeas corpus* issued herein on his behalf be discharged and that he pay the cost of these proceedings to be taxed.

And the said Rudolph Deimel, being now present in court, excepts to the order and judgment of the court aforesaid and
35 prays an appeal therefrom to the circuit court of appeals of the United States in and for the seventh circuit, which is granted upon his filing a bond for costs in appropriate form in the penal sum of two hundred and fifty dollars ($250) with security to be approved by the clerk which bond is immediately filed and approved.

Thereupon the said Rudolph Deimel also in open court further prays that he may be enlarged upon recognizance and discharged from his said arrest and imprisonment pending the said appeal, which prayer of said Rudolph Deimel is granted upon his entering in a recognizance in the penal sum of twelve thousand dollars in appropriate form with surety to be approved by the judge of this court, which said recognizance is immediately presented and approved by the judge of this court and filed herein.

It is further ordered by the court that the clerk embrace in the transcript of the record for the said circuit court of appeals the petition in this case, the exhibit thereto, the writ of *habeas corpus* issued thereon with the marshal's return thereto, and the exhibits attached to said return, the bill of exceptions signed by the judge of this court setting forth the evidence heard upon said motion and the several orders on this court entered in this cause, together with the bond and recognizance as herein provided.

NORTHERN DISTRICT OF ILLINOIS, } ss.:
Northern Division, }

I, S. W. Burnham, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and correct transcript of the record of all the proceedings had in said court in the matter of the petition of Rudolph Deimel, for a writ of *habeas corpus* as the same appears from the records and files of said court now remaining in my custody and control.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office in Chicago, in said district, this 17th day of December, A. D. 1894.

S. W. BURNHAM, *Clerk*.

36 In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, 1894.

MONDAY, *May* 6, 1895.

Court met pursuant to adjournment.

Present: Hon. William A. Woods, circuit judge; Hon. James G. Jenkins, circuit judge; Hon. John W. Showalter, circuit judge.

UNITED STATES OF AMERICA *ex Rel.* RUDOLPH DEIMEL
vs.
JOHN W. ARNOLD, U. S. Marshal. } # 221.

Appeal of Rudolph Deimel in the matter of the petition for a writ of *habeas corpus.*

It is ordered by the court that this cause be, and the same is hereby, set down for hearing May 16, 1895.

37 THURSDAY, *May* 16, 1895.

Court met pursuant to adjournment.

Present: Hon. William A. Woods, circuit judge; Hon. James G. Jenkins, circuit judge; Hon. John W. Showalter, circuit judge.

UNITED STATES OF AMERICA *ex Rel.* RUDOLPH DEIMEL
vs.
JOHN W. ARNOLD, U. S. Marshal. } # 221.

Appeal of Rudolph Deimel in the matter of the petition for a writ of *habeas corpus.*

Now, this day came the parties, by their counsel, and this cause now comes on to be heard on the printed record and briefs of counsel and on oral argument by Mr. Hiram T. Gilbert, counsel for appellant, and Mr. T. A. Moran, counsel for appellee; and the court, having heard the same, takes this matter under advisement.

38 MONDAY, *October* 7, 1895.

Court met pursuant to adjournment.

Present: Hon. William A. Woods, circuit judge; Hon. James G. Jenkins, circuit judge; Hon. John W. Showalter, circuit judge.

39 United States Circuit Court of Appeals for the Seventh Circuit.

Nos. 221 and 228. October 7, 1895.

UNITED STATES OF AMERICA *ex Rel.* RUDOLPH DEIMEL *vs.* JOHN W. ARNOLD, United States Marshal.	Appeal from the Circuit Court of the United States for the Northern District of Illinois, Northern Division.
JOSEPH DEIMEL and RUDOLPH DEIMEL *vs.* JULIUS STROHEIM and SALO J. STROHEIM.	In Error to the Circuit Court of the United States for the Northern District of Illinois, Northern Division.

Before Woods, Jenkins, and Showalter, circuit judges.

WOODS, circuit judge, delivered the opinion of the court:

These cases were submitted together. Rudolph Deimel, the relator in the first, and one of the appellants in the second case, applied to the circuit court for the writ of *habeas corpus*, alleging that he was held in unlawful imprisonment by virtue of a writ of *capias ad satisfaciendum* issued on a judgment rendered against him by that court on the 23rd day of July, 1894, in an action on the case for deceit, wherein Julius Stroheim and Salo J. Stroheim were plaintiffs and the relator and another were defendants. It is averred, as ground for the application, that the judgment was the result of a trial by the court without a jury and that neither the relator nor his codefendant, "either or both of them, ever executed a formal waiver in writing of a trial by jury" in the cause, and that
40 under the act of June 17, 1893,—Laws of Illinois, 1893, page 96,—whereby it is provided "that no person shall be imprisoned for non-payment of a fine or a judgment in any civil, criminal, quasi-criminal, or *qui tam* action, except upon conviction by jury; provided, * * * that when such waiver of jury is made, imprisonment may follow judgment of the court without conviction by jury," the writ of *capias ad satisfaciendum* was unauthorized and the imprisonment of the relator was illegal.

The record of the case shows that on January 9, 1893, the issues having been made up, a stipulation entitled in the cause and signed by the names of attorneys for the plaintiffs and defendants respectively was filed, which reads: "It is hereby stipulated and agreed by and between the parties that a trial by jury in the above-entitled cause shall be waived and that the cause shall be submitted to the court for trial, to be tried by Judge Grosscup." The trial, commencing March 28th, was had before Judge Bunn, who had been designated to hold the court, and his findings of fact, entered of record July 23, 1894, contain the following recital: "This cause coming on now to be heard before the court without the interven-

tion of a jury, a jury having heretofore been expressly waived by stipulation in writing of all the parties hereto, which said stipulation was heretofore duly filed herein by the attorneys of record for the parties to this suit with the clerk of this court." And the entry of judgment, made the same day, contains this recital: "On the stipulation in writing of all the parties hereto heretofore duly filed herein by the attorneys of record for the parties to this suit with the clerk of this court, this cause is submitted to the court for trial without the intervention of a jury." A bill of exceptions signed the 23rd day of August and filed September 17, 1894, a copy of which was attached to and made a part of the petition, shows, among other things, that on several occasions after the first day of January and before the 28th day of March, 1894, both of the defendants, in open court, by their counsel, expressly consented and agreed that the cause might and should be tried before Judge Bunn without a jury, and that with such consent, given in open court by counsel for both parties, the cause had been set peremptorily for hearing before Judge Bunn on March 28th, 1894, but on that day when the case was called and before entering upon the trial the defendants, by counsel, in open court, "objected to the trial of the cause before Judge Bunn," basing their objection solely and exclusively upon the stipulation of January 9, 1893, already quoted, which was produced and read, and which the bill states "was the only stipulation or waiver in writing filed in said cause for the submission of said cause for trial without a jury."

41 The writ having been granted, issued and served upon the marshal, that officer made return that he held the petitioner by virtue of the writ of *capias ad satisfaciendum* aforesaid, a copy of which was set out in the return, and afterwards the cause having come on to be heard on the motion of the petitioner to be released from imprisonment, the court, upon consideration of the petition, the return of the marshal, and the evidence adduced, consisting of the bill of exceptions set out in the petition, admitted over objection, the docket entries of the finding and judgment upon which the writ of *capias ad satisfaciendum* issued, and a copy of that writ, denied the motion and ordered the petitioner remanded to the custody of the marshal. These rulings are assigned as error in the first case.

In the other case, No. 228, wherein was rendered the judgment on which the writ of *capias ad satisfaciendum* was issued, it is shown by a bill of exceptions that on November 28th, 1894, the defendants moved the court to correct the entry of the judgment, as made July 23, 1894, so as to show that the stipulation referred to in the recital, waiving a jury, was signed, not by the parties, but by their attorneys of record, and in support of this motion, over objection, read the bill of exceptions the substance of which has already been stated, and the plaintiffs having offered in evidence the findings of fact signed by the judge, the court overruled the motion. It appears by another bill of exceptions that on the 20th day of December, 1894, both parties being present by attorneys, the defendants moved the court to recall and quash the writ of *capias ad satisfaciendum*, and in

support of the motion, besides showing the issue of the writ, proved the arrest thereunder of the defendant, the proceedings on the application for the writ of *habeas corpus*, as already detailed, the appeal taken to this court, and also offered in evidence the bill of exceptions, before mentioned, and the plaintiffs having put in evidence the judgment entry, the court overruled the motion.

The errors assigned in this case are upon the finding that the jury had been waived by stipulation in writing by the parties, upon the recital to the same effect in the entry of judgment, upon the trying of the cause by Judge Bunn without a jury, and upon the overruling of the motion to correct the entry of judgment.

It has been conceded in argument that there was no error in the mere fact of trial, without a jury, by the judge who presided. That was warranted by the oral consent shown to have been given by counsel in open court,—saying nothing of the written stipulation which was upon file. The other assignments are equally unavailing. If, as contended by counsel for the plaintiff in error,
42 the written waiver of a jury was upon condition that the trial should be before the particular judge named, and the trial before another judge was lawful only because of the oral consent thereto, then there can be no review touching either the finding or the judgment. It has been often so decided: Kearney *vs.* Case, 12 Wall. 275; County of Madison *vs.* Warren, 106 U. S. 622; Bond *vs.* Dustin, 112 U. S. 604, 606; Spalding *vs.* Manasse, 131 U. S. 65.

And where there has been a written waiver of the right to try by jury, it is equally well determined that there can be no inquiry upon writ of error into questions of fact,—the review in such cases being limited to rulings of the court in the progress of the trial and, when there has been a special finding, to the determination of the sufficiency of the facts found to support the judgment. Distilling & Cattle Feeding Company *vs.* The Gottschalk Co., (by this court this term), and cases cited. "The most appropriate evidence of a compliance with the statute is a copy of the stipulation in writing filed with the clerk. But the existence of the condition upon which a review is allowed is sufficiently shown by a statement in the finding of facts by the court, or in the bill of exceptions, or in the record of the judgment entry, that such a stipulation was made." Bond *vs.* Dustin, *supra*, 607. The finding being unassailable, it follows that the judgment, which is in strict conformity with the finding, is not open to dispute.

Was reviewable error committed when the court refused to correct the entry in conformity with the facts as stated in the bill of exceptions? The bill of exceptions being in the record, was any correction of the entry necessary? For the purposes of a writ of error, or direct attack upon a judgment, it is not disputed that the statements of a bill of exceptions are to be taken as true, and controlling of inconsistent recitals of docket entries which are made by a clerk, but when the attack is collateral, as when the validity of a judgment is questioned in an application for the writ of *habeas corpus*, it is contended by counsel for the appellee, on authorities cited, that "the judgment recitals and findings of the court cannot be questioned,"

on the strength of a bill of exceptions, or other evidence *dehors* the record. This point we need not decide. If the rule be as contended, it was no obstacle in the way, but, rather, constituted a strong reason for granting the motion to correct the entry of judgment, if the proposed correction were a material one. The correction, if necessary, might have extended to the finding of facts, which was spread of record the same day the judgment was rendered. It is not
43 clear that a ruling upon such a motion is reviewable upon writ of error; Boyle *vs.* Zacharie, 6 Peters 648; McCargo *vs.* Chapman, 20 How. 555; *Ex parte* Flippen, 94 U. S. 348; but, however that may be, we are of opinion, on grounds to be stated presently, that the proposed correction, if made, would not have affected the character of the judgment or of the writs by which it might be enforced. While, therefore, the court, during the term at which the judgment was entered, as we think, might well have amended the entry so as to remove all dispute of its correctness, its refusal to do so was harmless.

It remains to consider, in the *habeas corpus* case, whether the court erred in remanding the appellant to the custody of the marshal. The question recurs whether, in that case, it was competent to show by the bill of exceptions in the other case, in contradiction of the finding of facts and the recital in the judgment entry, that there had been no formal waiver of the jury executed by the parties. Unless that evidence was admissible, the finding and entry were conclusive that there had been such waiver, and that the imprisonment of the petitioner was not in violation of the statute of which he claimed the benefit. The controlling and more important question, however, is whether that statute of the State of Illinois is applicable to judgments of the courts of the United States, sitting in Illinois. We are of opinion that it is not applicable, and prefer to rest our decision upon that ground rather than upon a technical view of the admissibility or force of evidence, or upon the other proposition of counsel for the appellee that the formal waiver required by the statute of the State is one which may be executed by the attorney of the party.

A review, in detail, of the various acts of Congress authorizing and regulating process out of the courts of the United States is unnecessary here. Section 14 of the judiciary act of 1789 authorized the courts to issue "the writs of *scire facias*, *habeas corpus* and all the other writs not specially provided for by statute which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." In United States Bank *vs.* Halstead, 10 Wheat. 51, 55, it was said: "That executions are among the writs hereby authorized to be issued, cannot admit of a doubt; they are indispensably necessary for the beneficial exercise of the jurisdiction of the courts; * * * The precise limitations and qualifications of this power, under the terms, agreeable to the principles and usages of law, is not, perhaps, so obvious. It, doubtless, embraces writs sanctioned by the principles and usages of the common law. But it would be too limited a con-
44 struction, as it respects writs of execution, to restrict it to such

only as were authorized by the common law. It was generally known to Congress that there were in use in the State courts writs of execution other than such as were conformable to the usages of the common law. And it is reasonable to conclude that such were intended to be included under the general description of writs agreeable to the principles and usages of law." It follows that under this provision of the act establishing Federal courts, which remains in force as section 716 of the Revised Statutes, those courts had from the beginning the power to issue the writ of *capias ad satisfaciendum*. That writ is expressly mentioned in the process act enacted five days after the passage of the judiciary act, and in later legislation on the same subject, and whatever restrictions there may be upon the use of the writ must be found directly or indirectly in the Federal statutes. If State legislation has any bearing it is because Congress has so provided. Section 914 of the Revised Statutes, known as the conformity act, even if it had not been declared to be inapplicable to remedies upon judgments, Lamaster *vs.* Keeler, 123 U. S. 376, could not be deemed to give effect to this statute of Illinois, because by section 649 of the Revised Statutes the stipulation for the waiver of a jury may be filed either by the parties or their attorneys, and the finding of the court upon those facts, whether general or special, it is provided "shall have the same effect as the verdict of a jury." See *Ex parte* Fisk, 113 U. S. 710. It has been suggested that this provision has reference only to the right of appeal, but manifestly that is not so, since that right is given and limited by another section, namely, section 700 of the Revised Statutes. There is nothing to the contrary in Kearney *vs.* Case, 12 Wall. 275, or in Gilman *vs.* Ill. & Miss. Tel. Co., 91 U. S. 603. Once process has issued, section 914, it has been declared, is applicable to the conduct of the officer in the execution thereof. Wyman *vs.* Southard, 10 Wheat. 1. Section 916 of the Revised Statutes entitles a party recovering a judgment in any common-law cause "to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are now provided in like causes by the laws of the State in which such court is held," &c., but that provision by its terms is inapplicable to an execution against the body of the debtor. If, however, the writs against person and property be regarded as governed by the same rule, and required to conform in the first instance to local legislation, both have been authorized by the laws of Illinois from the earliest days, and as issued out of the Federal courts they are not governed or affected by changes in the State law on the subject unless the changes have been adopted by general rules of those courts. Imprisonment for debt has been forbidden on process issuing from a court of the United States in any State whereby the local-law imprisonment for debt has been or shall be abolished, and all modifications, conditions and restrictions upon such imprisonment provided by the laws of any State are made applicable to Federal process to be executed therein, Revised
45 Statutes, sec. 990, but imprisonment for debt, as used in this and like statutory or constitutional provisions, means debts arising out of contract, and does not extend to actions for tort, nor

to fines or penalties arising from a violation of the penal laws of the State. It was so held by the supreme court of Illinois in Kennedy *vs.* People, 122 Ill. 649, and to the same effect are Hanson *vs.* Fowle, 1 Sawyer, C. C. 497; U. S. *vs.* Walsh, 1 Abb. C. C. 66; *Ex parte* Bergman, 18 Nev. 331; Harris *vs.* Bridgers, 57 Ga. 407; McCool *vs.* State, 23 Ind. 131; Long *vs.* McLean, 88 N. C. 4; Lathrop *vs.* Swiger, 39 Barb. 396; Cooley Const. Lim. 341, 4th ed. 422.

The appeal in the first case is dismissed and the judgment in the other case affirmed at the cost of the relator and appellant.

46 UNITED STATES OF AMERICA *ex Rel.* RUDOLPH DEIMEL
vs.
JOHN W. ARNOLD, U. S. Marshal. } = 221.

Appeal of Rudolph Deimel in the matter of the petition for a writ of *habeas corpus*.

Appeal from the circuit court of the United States for the northern district of Illinois.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the northern district of Illinois, and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the appeal from the order of the said circuit court in this cause be, and the same is hereby, dismissed with costs.

47 Afterwards, to wit, on the fourth day of November, 1895, the appellant filed his petition for a rehearing herein.

MONDAY, *February* 3, 1896.

Court met pursuant to adjournment.

Present: Hon. William A. Woods, circuit judge; Hon. James G. Jenkins, circuit judge; Hon. John W. Showalter, circuit judge.

UNITED STATES OF AMERICA *ex Rel.* RUDOLPH DEIMEL
vs.
JOHN W. ARNOLD, U. S. Marshal. } 221.

Appeal of Rudolph Deimel in the matter of the petition for a writ of *habeas corpus*.

It is ordered by the court that the petition for rehearing in this cause be, and the same is hereby, overruled; and it is further ordered that mandate do not issue in the cause until further order of this court.

48 United States Circuit Court of Appeals for the Seventh Circuit.

I, Oliver T. Morton, clerk of the United States circuit court of appeals for the seventh circuit, do hereby certify that the foregoing